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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

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JUDGES
OF THE
COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.
WILLIAM DANIEL,
RICHARD C. L. MONCURE,
GEORGE H. LEE,
GREEN B. SAMUELS.

Attorney-General:
WILLIS P. BOCOCK.



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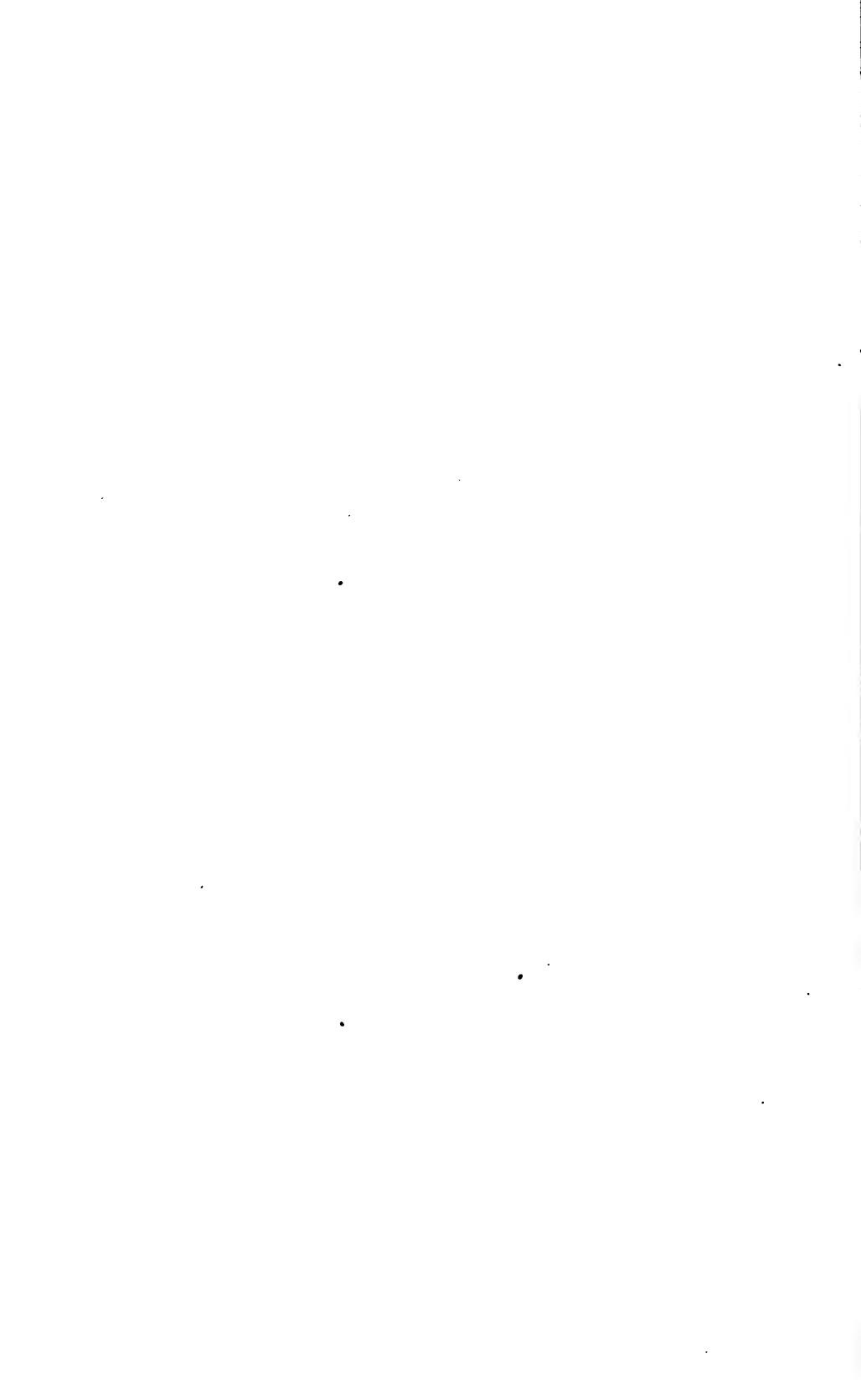
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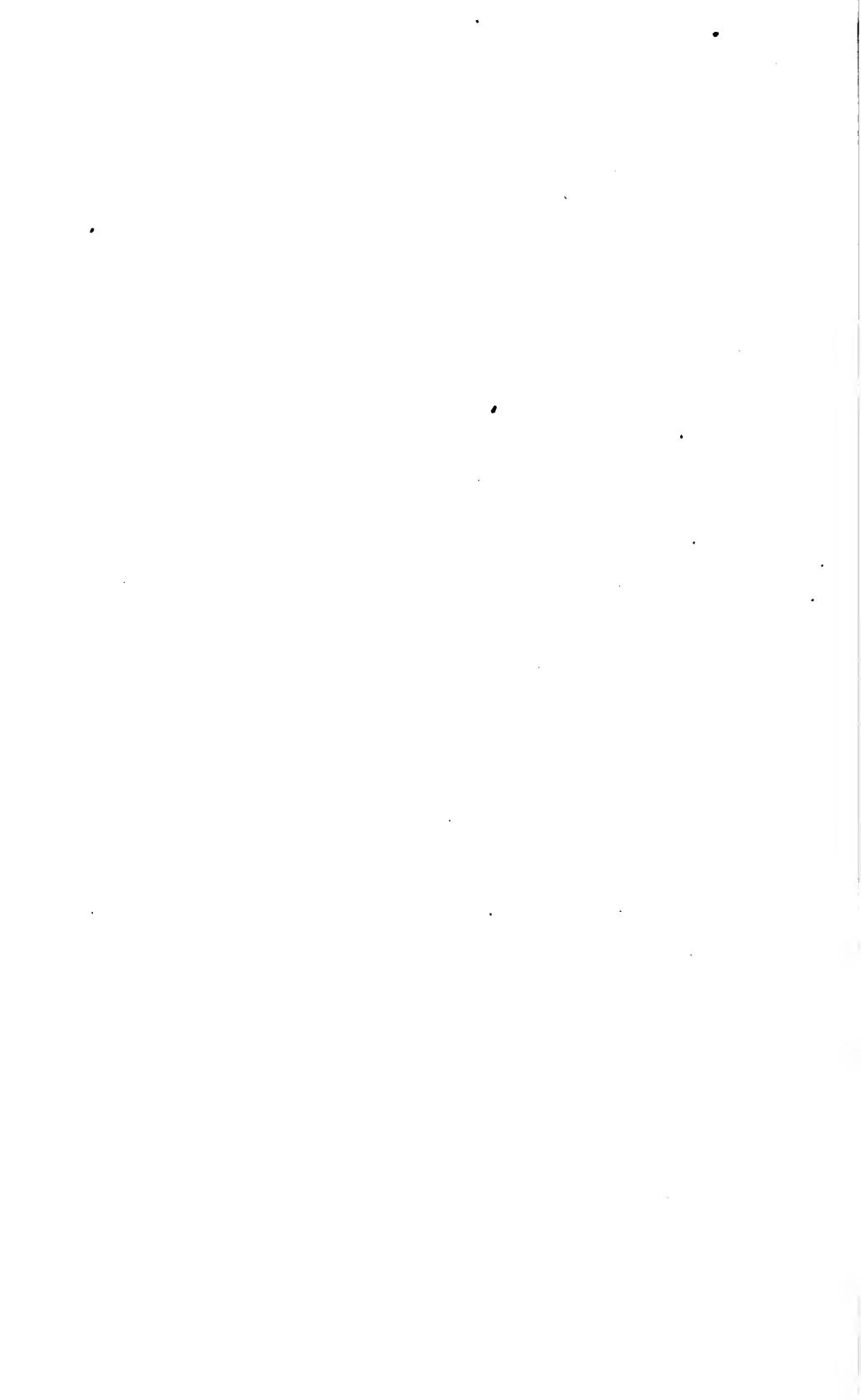
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ERRATUM.

Page 688, the opinions of the Judges should read:
“**MONCURE** and **SAMUELS**, Js., concurred.
ALLEN, P. and **LEE**, J., dissented.”



CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

Richmond.

YOUNG *v.* THWEATT & *als.*

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January
Term.

(Absent LEE, J.)

January 12.

An agreement is entered into in 1844 between T, a commission merchant in P, and Y, an inspector of tobacco at a ware-house in that city, by which T was to send all his tobacco to that ware-house, and Y was to endorse his notes to an amount not exceeding ten thousand dollars. At the same time three of the owners of the ware-house agree with Y that they will each bear a certain proportion of any loss he may sustain by his endorsements for T. This agreement with T is acted on until October 1847, when Y is removed from his place as inspector; and soon thereafter, T, with the consent of Y, ceases to send his tobacco to that ware-house. At this time Y is first endorser on a note of T, and two of the owners of the ware-house are also endorsers upon the note. It is afterwards renewed with Y, still the first endorser, and with two other endorsers, they being inspectors at another ware-house, where T was about to send his tobacco. In May 1848 T fails, and Y is compelled to pay the note. Y is entitled to recover from each of the owners of the ware-house the proportion of the note which he had agreed to pay.

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In December 1844 James Young and Jordan Floyd were inspectors of tobacco at Oaks ware-house in the city of Petersburg; and Robert Leslie, Caroline Macfarland and D. B. Tennant or Ann Brydon were the owners of the ware-house. By deed bearing date the 20th of December 1844, Henry Thweatt, who was a commission merchant in Petersburg, reciting that he had entered into an agreement with Young to send all the tobacco which may be consigned to him or which he may in any otherwise have the control of, to Oaks ware-house for inspection, on condition that said Young shall endorse his the said Thweatt's paper, or make loans or advances to him, to the amount in all of ten thousand dollars, the said Thweatt agreeing at the same time to give a deed of trust to secure and indemnify the said Young upon certain property, debts, &c. as herein after more particularly described, conveyed to Robert Leslie all the books, debts or accounts, bonds, &c. tobacco or other produce then owned by Thweatt, and all which might become due or be owned by him pending the agreement or the continuance of the arrangement before mentioned. And the said Leslie was invested with full and irrevocable authority to recover the said debts and property, and grant receipts and discharges for the same; and to take possession of the said books and evidences of debt when required so to do for the purposes aforesaid, by the said Young; and to collect the debts and sell the property on such terms, in such manner and at such times and places as he should deem best for all parties; and out of the proceeds, after paying all proper charges, to pay off all such debts as should be due from Thweatt to Young or as Young should be bound for as endorser for said Thweatt, and the balance pay over to Thweatt. But it was agreed that the said Young should not require the said trustee to close the trust by taking possession, &c. as aforesaid until after

the expiration of twelve months from the date of the deed, unless in case of the death of said Thweatt, or unless the said Young should consider himself in danger of losing by a further continuation of said business, and the said trustee should consider his fears well grounded; or unless the said Thweatt should fail to comply with his agreement to encourage the said ware-house by sending all tobacco consigned to or belonging to him, and designed for or which might stop in Petersburg, to the said ware-house, and using all honorable means to increase the inspection at the same. This was plaintiff's exhibit No. 1.

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On the same day that this deed of trust was made, articles of agreement were entered into between James Young of the one part and Robert Leslie, Caroline Macfarland, Jordan Floyd and David B. Tennant of the other, by which, after reciting the agreement between Thweatt and Young, as expressed in the deed of trust aforesaid, they say, that the said Leslie and Macfarland and Ann Brydon, for whom the said Tenant undertakes, being all part owners of the said ware-house, and the said Floyd being an inspector at the same, all of whom will be benefited by the increase of the business and of the inspections of said ware-house, have agreed to bear a share of any loss which the said Young may sustain in consequence of such loans or advancements or endorsements, in certain proportions severally and respectively as follows, viz: Robert Leslie one-sixth, Jordan Floyd one-sixth, Caroline Macfarland two-sixths and David B. Tennant in place of Ann Brydon, one-sixth; so that the said Young will bear his one-sixth; each being bound separately, and neither bound to make good the share of the other, so that if either fail or refuse or be unable to pay his part, the said Young is not to look to the others to make up that part of his loss. It being understood that the said Young is not to advance or loan

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the said Thweatt money or endorse his paper at any one time to a greater amount than ten thousand dollars; and provided that the said Young shall use all due diligence to make the trust deed of the 20th of December 1844 from said Thweatt to Robert Leslie, available, and shall only call upon the said parties for their respective shares as aforesaid of any loss, after exhausting all legal and proper means of making the said trust fund available.

But as the said Young may be put to great inconvenience and suffer loss before the funds of the said trust may all be realized, it is agreed and understood, that the parties will, whenever the said Young shall be required to pay or take up an amount greater than a reasonable estimate of the probable avails of the trust fund, they will, at once, pay and advance to him (before the closing of the trust) their respective proportions of the sum which he may thus be required to pay or provide for, over and above the probable avails of the trust fund. This was plaintiff's exhibit No. 3.

On the 17th of June 1846 Thweatt executed another paper, by which he assigned to Leslie all debts due to him which were contracted since the execution of the previous deed, upon the trusts of that deed. This was plaintiff's exhibit No. 2.

Thweatt and Young proceeded to carry out the arrangement. Thweatt sent his tobacco to the Oaks ware-house, and Young endorsed his paper; and this was done until the fall of 1847. In October 1847 Young was removed from the office of inspector at Oaks ware-house; and soon after that by the advice, as the defendants insisted, of Young, Thweatt sent his tobacco to another ware-house. At this time Young was endorser on three notes of Thweatt; one of these was for fifteen hundred dollars. Thweatt had obtained a loan of two thousand dollars from the bank as early as February 17th, 1846, upon a note on which

Young was first endorser; and Leslie and Tennant were also endorsers. In March 1847 this note was reduced to fifteen hundred dollars, and was continued with the same endorsers until November 9th, 1847, when it was renewed, with Young as first endorser, H. H. Lewis second endorser, and Leslie and Tennant as subsequent endorsers. In January 1848 it was again renewed, with Young, E. A. Wyatt and N. Blick as endorsers; and so continued to be renewed until June, when, Thweatt having failed in May, it was paid off by Young, who in December of that year, recovered a judgment upon it against Thweatt. It appears that Lewis was an inspector in a ware-house to which at the time of the endorsement Thweatt sent his tobacco; and that Wyatt and Blick were inspectors at Centre ware-house; and that some arrangement was made between them and Young, who was about to form a partnership with Thweatt, by which the partnership was to send their tobacco to Centre ware-house, and Wyatt and Blick were to endorse their paper.

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The other two notes were for eight hundred and seventy-five dollars each, on which Young was the first endorser, and Leslie and Tennant were subsequent endorsers; and the notes were renewed from time to time with the same endorsers, until May 1848, when they were taken up by Tennant, who in December of that year recovered judgments upon them against Young the first endorser.

It appears that Young's endorsements for Thweatt amounted at one time to about eight thousand five hundred dollars, but were reduced in October 1847, as before stated, to three thousand two hundred and fifty dollars, having been reduced by the application of the trust funds to this object.

Thweatt having failed in May 1848, on the 3rd of June Young directed Leslie to demand of him his

1855. books, papers and accounts; and the application was
January made: But Thweatt declined to deliver them, saying
Term. he chose to settle them himself.

Young In January 1849 Young instituted a suit in equity
v. in the Circuit court of Petersburg, against Thweatt,
Thweatt & als. Leslie, and the other parties to the agreement of December the 20th, 1844, for the purpose of enforcing said agreement, and compelling the said parties to bear their proportion of the three notes before mentioned. In his bill he set out the deeds of Thweatt and the agreement with Leslie and the other parties, the endorsement of the notes, and by whom they had been paid, and the judgments recovered upon them. He stated that Floyd was insolvent, and admitted that he must therefore bear the loss of two-sixths of the debts. He averred that he had pursued the course in relation to the trust fund, that he thought best for all parties; and asked that a receiver might be appointed to collect the debts.

Tennant answered, and acquiesced in the plaintiff's pretensions. Leslie and Mrs. Macfarland insisted that they were not responsible for any part of the debt of fifteen hundred dollars; and as to that, relied upon the facts that Thweatt had ceased to send his tobacco to their ware-house, as they insisted, with the consent and they believed by the advice of Young; and that after this the note had been renewed with other endorsers by an arrangement between Young and these new endorsers, who were inspectors at Centre ware-house, by which the liability of the defendants for that note was released.

In the progress of the cause a receiver was appointed to collect the trust fund, the net proceeds of which were one thousand and sixty-two dollars and fifty-six cents. And the cause came on to be finally heard on the 10th of May 1852, when the court held that the defendants Leslie, Macfarland and Tennant

were not liable to contribute to the payment of the note of fifteen hundred dollars; and as to that dismissed the bill. And the court further held that as to the two notes taken up by Tennant, the trust fund was to be applied in part satisfaction of them, and for the balance the parties to the agreement were liable according to its terms; and that Young must pay two-sixths thereof, he having admitted in his bill, that Floyd was insolvent: And the decree was accordingly. From this decree Young applied to this court for an appeal, which was allowed.

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Patton, for the appellant.

Joynes, for the appellees.

DANIEL, J. It is stated in the bill and admitted in the answers, that the note for fifteen hundred dollars on which the suit is founded, was given for the purpose of taking up or retiring a note, for the same sum, drawn by Thweatt and endorsed by Young, for the accommodation of Thweatt, in pursuance of the agreement recited in the deed of trust filed as exhibit No. 1. And it is also admitted that the last mentioned note was made and given in strict conformity with the understanding and agreement of the parties set forth in the covenant of the 20th December 1844, filed as exhibit No. 3. It is also further admitted that nothing had occurred, prior to October 1847, to relieve or exonerate Leslie, Floyd, Tennant or Mrs. Macfarland from the liability which they severally incurred, by virtue of said covenant, to contribute towards making good any loss which Young might sustain, in consequence of his endorsement of said note.

If that liability is gone, at what time did it cease to exist? By what act has it been lost or destroyed? It is not pretended that the appellees have themselves

1855. done any thing avowedly in discharge of it: And
January there is an entire absence of any proof or even alle-
Term. gation that Young has, ever, in express terms, released
Young the parties from their covenant, or forgiven them their
v. liability to indemnify him.
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Let it be, that so soon as Thweatt withdrew his custom from Oaks ware-house, there ceased to be any obligation on the part of Young to make farther advances of money or endorsements of new paper for him, and that the other parties to the covenant were thenceforward discharged of all liability to indemnify Young for losses sustained on account of fresh loans of money or credit for the accommodation of Thweatt; still it is not perceived how this consideration can, in any manner, affect the duties and obligations of the parties, in respect to advances made, or liabilities, as endorser, incurred by Young before the happening of that event. Nor is it perceived how, even, by coupling this with the further concession that Thweatt transferred his custom from Oaks to another ware-house with the knowledge and even approbation of Young, any case is yet made discharging the other parties to the covenant from their duty of participating in any loss arising out of the endorsement by Young of the note of fifteen hundred dollars.

No limitation to the continuance of the social business relation between the parties, growing out of the contract between Thweatt and Young, and the covenant between Young and the other parties, is provided for in either of those agreements. Yet when we look to the nature of the understanding between the parties and the objects of their *quasi* partnership, I can perceive no ground for imputing a breach of contract or of good faith either to Thweatt in ceasing to send, or to Young in advising him to discontinue sending, his tobacco to Oaks ware-house, under the change of circumstances which had taken place.

The understanding between the parties can hardly be interpreted, I apprehend, as meaning that the relation between them, established by force of the agreements just mentioned, was to continue during their lives, regardless of all changes of their respective conditions, and after all the motives, on which that relation was founded, had ceased to exist. The limits to the continuance of the reciprocal obligations of the parties to keep up such a connection must, from the very nature of the latter, be identical with those that bound the existence of the objects and motives in which the connection had its origin. By sending to Oaks ware-house the tobacco over which he had control, as a commission merchant, Thweatt would contribute directly to the advancement of the perquisites and emoluments of Young as an inspector. The motive which Young had, therefore, for entering into the contract, was plain. That motive continued to operate so long as he remained inspector at Oaks. Like motives influenced the proprietors of the ware-house in entering into the covenant. Their revenues as owners of the house depended on the number of hogsheads which might be sent to it. They had an obvious motive of interest in obtaining the custom of Thweatt. They had a lively concern in seeing that his credit as a commission merchant was sustained. On the other hand, Thweatt, by agreeing to send his tobacco to Oaks, induced Young to lend him the use of his means and credit. And as to Floyd, his objects were common with those of Young. The obligations of the parties to and among themselves, it is apparent, therefore, grew out of, and rested upon, a community or reciprocity of motives and interests. And whenever a state of things might arise which would render it impossible that the object, contemplated by either one of the parties to the understanding, could be any longer promoted by continuing the relation, obvious

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1855. justice would seem to require that he, as well as the
January Term. others, should be thenceforward absolved from the
duty of continuing it. Let it be that no one of the
Young parties had a right, *ex mero motu*, and without the con-
v.
Thweatt sent of the others, abruptly to terminate the relation;
& als. yet I do not think that a party to such a contract
would do any wrong to the other parties in retiring
from the connection whenever, without fault on his
part, any event might occur rendering it impossible
that he could longer derive benefit from the existence
of the partnership. Suppose that Thweatt, from per-
manent disease or other cause, had been rendered un-
able to carry on his business as a commission mer-
chant, what claim, in law or equity, would the other
parties or either of them have had against him for
damages arising out of his failure thereafter to send
tobacco to Oaks ware-house? Or suppose that the
inspection at said ware-house, without fault on the
part of the proprietors, had been discontinued, what
show of justice or propriety would there have been in
Young's requiring that they should still aid him in
sustaining the credit of Thweatt? Or suppose (as is
the case) that Young has been superseded in his office
of inspector at Oaks by the appointment of another
person in his place, what right have the proprietors to
impute legal blame to him for thereafter using his mo-
ney, his credit and his influence for the purpose of
increasing the inspections at any other ware-house in
whose well doing he might take or feel an interest?

It seems to me that on the happening of either of
the events just supposed, any one of the parties would
have had a right, without accountability therefor to
the others, to dissolve the connection. And when
Young, under the circumstances disclosed in the re-
cord, ceased to be an inspector at Oaks, he had a per-
fect right to transfer his influence to any other ware-
house; and if, as is alleged, he advised Thweatt to

pursue a similar course, he did nothing on which the proprietors can found any claim, in law or equity, against him. The defense to his demand, based on his conduct in this regard, is, therefore, I think, wholly untenable. Nor do I think that the other grounds relied on furnish any better show of justice.

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It is true, that by the terms of the covenant Young was charged with the duty of using all proper diligence to see that the trust deed of the 20th December 1844, executed by Thweatt for his indemnity, should be made available. There is, however, the entire absence of proof to show that he, in any respect, neglected that duty. No proof has been offered to show that, by pursuing a course different from that taken, the trust fund could have been made to yield a dollar more than the sum which had been realized from it. Besides, Leslie, one of the proprietors, was the trustee in the deed, and he, as well as the others, had an interest in seeing that the trust fund should be made as productive as possible; and if he or they saw any mismanagement or misapplication of it by Thweatt, duty as well as interest would have prompted them to complain of it. No such complaint appears to have been made, and it is but fair to infer that no ground for any existed. And it is shown that so soon as it became known that Thweatt had failed, Young suggested the only step that was taken towards securing the trust subject, by directing Leslie to demand of Thweatt his books, papers and accounts.

The idea that the last provision of the deed imparted any new or further force to the agreement between Young and Thweatt, by which the latter stipulated to send his tobacco to Oaks, is, I think, without any foundation. By that provision, Young is not to require the trustee to close the trust until the expiration of twelve months from the date of the deed unless in case of the death of Thweatt; or unless

1855. Young shall consider himself in danger of losing by a further continuation of his business, and the trustee shall consider his fears well grounded; or unless January Term.
Young v. Thweatt & als. Thweatt shall fail to comply with his agreement to encourage the ware-house by sending his tobacco, &c. It will be seen that this last provision has direct reference to the agreement between Thweatt and Young; and even if it could be treated as a covenant by Thweatt, its extent is, by the express terms of the provision, to be measured by that of the agreement. The agreement and the said supposed covenant have the same scope and force, and when the agreement was discharged or fulfilled, (as we have endeavored to show it has been,) the supposed covenant in the deed was also performed or ceased to be of any further obligatory force. And if under the circumstances Thweatt had a sufficient excuse for the failure to continue his custom to the ware-house, surely no blame attaches to Young for omitting to close the trust merely on the score of such failure.

Nor can I see how the rights and duties of the parties to the covenant of the 20th December 1844, have been in any manner affected by the consideration that the note of fifteen hundred dollars was, in its origin and at several renewals, endorsed by Leslie and Tennant, and that after Young was removed from his office of inspector and Thweatt ceased sending his tobacco to Oaks, Leslie and Tennant discontinued their endorsements; and that in the subsequent renewals of the note their names, as endorsers, were substituted by those of Blick and Wyatt. The endorsement of the note by Leslie and Tennant was not in conformity with any requirement of the covenant. Their undertaking in the covenant was not to endorse for Thweatt or for Young, but to pay their shares of any loss sustained by Young in consequence of his endorsement for Thweatt. They had strong motives

of interest, as we have shown, in sustaining Thweatt as a commission merchant, but their endorsement of his notes was a matter wholly beside and out of their covenant with Young. Their endorsement of the note gave no new force to the covenant; and their declining to continue that favor or accommodation after the 1st of October 1847, detracted none from it. Their conduct in this regard has no legal import or effect whatever, bearing on their covenant. If they desire that Young should also forthwith decline to renew the note and close the trust, they should have notified him to that effect. The mere withdrawal of their names from the paper surely could not perform the office of such a notice.

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If there was any proof that the substitution of the names of Leslie and Tennant by those of Blick and Wyatt was made in pursuance of any agreement on the part of the latter, to exonerate the parties to the covenant from their duty to indemnify Young, the case might be different. But there is no such proof; and in its absence, the only effect of that circumstance was to relieve Leslie and Tennant from all liability as endorsers of the note, and to leave the covenant, as it stood before, in full force and virtue.

By the substitution of the new note for the old one, the *evidence* of the debt was changed; but the *debt* of Thweatt to the bank, the *liability* of Young, as the first endorser, for it, and the *duty* of Leslie, Tennant, Floyd, and Mrs. Macfarland to *indemnify* him against that liability, all remained the same.

I can see nothing in the case on which the appellees can rely to set off or discharge their undertaking, or which makes it inequitable or unconscientious in Young to insist on the indemnity for which he has contracted. In the view I have taken of the case, the note for fifteen hundred dollars, and the two notes for eight hundred and seventy-five dollars each, all

1855. stand on the same footing; and I think that the court, instead of rendering the decree complained of, should have held the several parties to the covenant liable for the aggregate of the three debts in the proportions provided for in said covenant, to-wit: Leslie one-sixth, Floyd one-sixth, Tennant one-sixth, Young one-sixth, and Mrs. Macfarland two-sixths. And as Floyd is insolvent, and by the terms of the covenant Young is restricted in his recourse against the other parties to the amounts of their shares, of any loss respectively; and as Young, in his character of first endorser of the notes paid by Tennant, is primarily liable, and he and Tennant are the only parties to the covenant who have paid more than their shares of the loss, in adjusting the liabilities of Young, Leslie, Tennant and Mrs. Macfarland, Young should account for Floyd's one-sixth, and the whole fund in the control of the court should be applied first to the reimbursement of Tennant for all that he has paid over and above his one-sixth of the whole loss.

I am for reversing the decree, with costs to the appellant, and remanding the cause for farther proceedings, and a final decree in conformity with the foregoing views.

The other judges concurred in the opinion of DANIEL, J.

The decree was as follows:

It seems to the court, that nothing is shown in the pleadings or proofs which can impair the force of the covenant of the 20th December 1844, filed as exhibit No. 3, or make it inequitable or unconscientious in Young to insist that the other parties thereto shall contribute towards making good the loss sustained by him in consequence of his endorsement of the note of fifteen hundred dollars, in the proportions provided for

in said covenant. It further seems to the court, that the ultimate liabilities of the parties to said covenant, in regard to the two notes of eight hundred and seventy-five dollars each, are the same with those which have attached to the said note of fifteen hundred dollars; and that the three notes should be treated as constituting one entire debt or liability, for any loss arising out of which the parties to the said covenant of the 20th December 1844 ought to be held liable in the following proportions, that is to say, Young one-sixth, Tennant one-sixth, Floyd one-sixth, Leslie one-sixth and Mrs. Macfarland two-sixths. And it appearing to the court that Floyd is insolvent, and that by the terms of the covenant aforesaid, Young has no right to recover, of the other parties thereto, anything more than the amounts of their respective shares or proportions of losses sustained by him in consequence of his endorsements for Thweatt, it seems to the court that in adjusting between the said Young, Tennant, Leslie and Macfarland their ultimate liabilities, Young should be held to account for the share or proportion of loss due by said Floyd. And it further appearing to the court that Tennant and Young are the only parties who have paid more than their shares of said loss, and Young, as a consequence of his being the first endorser on the two notes of eight hundred and seventy-five dollars each paid by Tennant, being liable to said Tennant therefor; and it also appearing that after applying the trust fund in the control of the court to the relief of Tennant, the balance paid by him will still be more than his share or proportion of the aggregate loss, it further seems to the court that said fund should be first applied towards the reimbursement of said Tennant for so much as he has paid exceeding his said share. It is proper also that there should be such decrees against Floyd and Thweatt re-

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1855. ^{January Term.} respectively as will fix the ultimate liabilities of all the parties in accordance with their several undertakings.

Young v. Thweatt & als. It therefore seems to the court, that the decree of the 10th of June 1852 is erroneous, and ought to be reversed. And the court doth adjudge, &c. that the same be reversed, with costs to the appellant. And the cause is remanded for further proceedings and a final decree in accordance with the principles herein above declared.

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1. The mayor of the city of Richmond has authority to try cases in which a party is prosecuted for the violation of a city ordinance. *Quere:* Whether in such a case a prohibition will lie to his proceeding to try the case, on the ground that the ordinance is in conflict with an act of the general assembly. And it seems it will not.
2. For the mode of proceeding in a case of prohibition, see the opinion of MONCURE, J.
3. There must be a rule to show cause why the prohibition should not issue, before the writ is issued.
4. This rule to show cause operates as a prohibition, until the further action of the court.
5. A statute requiring a license to keep a cook-shop, and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond, passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city.
6. It is not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro.

This was an appeal, by the mayor of the city of Richmond, from a judgment of the Circuit court of the city of Richmond, in a case of prohibition. The facts are stated in the opinion of Judge MONCURE.

R. T. Daniel, for the appellants.

Crump, for the appellees.

MONCURE, J. In September 1853 Clinton James, a free negro, presented a petition to the judge of the Circuit court for the city of Richmond, stating that he had been unlawfully prosecuted before the mayor of said city for a violation of an ordinance thereof, providing that "no negro shall keep a cook-shop

1855. within said city," under the penalty of stripes, at the discretion of the mayor; and that he had been duly licensed to keep a cook-shop under the provisions of the act of assembly of April 17th, 1853, Sess. Acts, p. 20, § 4, insisting that the said ordinance is in conflict with the said act of assembly, and therefore void; and that the mayor, in attempting to enforce the said ordinance, was exceeding his jurisdiction; and praying for a writ of prohibition to restrain the said mayor from holding cognizance of any such prosecution. The writ was accordingly awarded by the judge in vacation, issued by the clerk, returnable to the first day of the next term of the court for the trial of civil causes, executed on the mayor, and returned. At the next term, the parties appeared by their attorneys, and the mayor moved the court to discharge the said writ; but the court overruled the motion, and gave judgment for costs against the city. To that order a *supersedeas* was awarded by this court.

The writ of prohibition has not very often been resorted to in this state; the present being the first case of the kind which has been before this court; though there have been three cases before the General court, viz: *Miller v. Marshall*, 1 Va. Cas. 158; *Hutson v. Lowry*, 2 Id. 42; and *Jackson v. Maxwell*, 5 Rand. 636. Until the enactment of the new Code, there appears to have been no provision in our statute law concerning the writ of prohibition. It has always, however, been regarded as an existing legal remedy in this state, as the cases just cited will show. In the Code, and in the new Constitution and the legislation under it, the remedy is fully recognized, and various provisions are made in regard to it. Code, p. 612, ch. 155, p. 620 § 4; 621, § 3; 622, § 8; 641, § 4; Constitution, art. vi, § 9 and 11; Act of June 5, 1852, ch. 61, § 2, 3, 9 and 12, Sess. Acts, p. 53-4. For the nature of the writ and method of proceeding under it,

see 3 Black. Com. 112; 8 Bac. Abr. 206, tit. Prohibition; 7 Comy. Dig. 135, same title; *Home v. Earl Camden*, 2 H. Bl. 533; *Gould v. Gapper*, 5 East's R. 345; 1 Saund. 136, and notes. Much information on the subject may also be derived from the case of *Williams, ex parte*, 4 Pike's R. 537; appended to which is a note giving the forms used in the proceeding. See also *Arnold v. Shields*, 5 Dana's R. 18.

In the petition for the *supersedeas* in this case, two errors are assigned in the proceeding and order complained of:

- I. That even if the judgment of the mayor against James would be improper, or of questionable propriety, the writ of prohibition does not lie from the Circuit court to prevent the mayor from adjudging the question.
- II. That the ordinance was not in conflict with the act of assembly; or if it was, the act and not the ordinance should be made to give way.

In support of the first ground of error, it was argued that the mayor has ample power conferred on him by the charter, (Sess. Acts 1852, p. 265, § 50,) to "take cognizance of such cases as may be brought before him under the laws of the state, and in all cases in which *any ordinance or by-law of the city is alleged to have been violated*;" that therefore he had power to decide whether the ordinance in question was valid or not, and it was no excess of jurisdiction to do so: And that the assumption that he would decide wrong when the case came under his judgment, was wholly unwarrantable, and can, in no view of the subject, furnish ground of prohibition. I incline to think that this argument is well founded. See the cases of *Home v. Earl Camden* and *Arnold v. Shields*, before cited. But in my view of this case, it is unnecessary to decide this question.

In regard to the second ground of error, I am of

1855. opinion that the ordinance was not in conflict with the act of assembly. The only object of the act was to aid in raising a revenue by laying a tax on the business of keeping a cook-shop. It was not the object, nor the effect of the act, to give to every person who paid the tax and obtained a license to keep a cook-shop, the right to do so, notwithstanding any police regulations which might otherwise lawfully be made for the good government of a city or town, much less to repeal or annul any such regulations in actual existence at the time of the passage of the act. If the ordinance would have been lawful, had there been no such act, it is lawful notwithstanding the act; for there is nothing in the act to render it unlawful. The business of keeping a cook-shop before the passage of the act, was a lawful business, which any man might pursue, subject only to such lawful police regulations as might be made in regard to its being carried on within the limits of a town. The effect of taxing it was to restrict, not to enlarge the right of pursuing it, nor to exempt it from such lawful police regulations. The Code, ch. 54, § 17, p. 285, after conferring a great many specific powers on the council or board of trustees of a town, gives them the general power to protect the property of the town and its inhabitants, *and preserve peace and good order therein*; and for carrying into effect these and their other powers, authorizes them to make ordinances and by-laws consistent with the laws of the state, and to prescribe fines or other punishment for violations thereof. These provisions, not being in conflict with any provision of the charter of the city of Richmond, nor inconsistent with the act passed March 30, 1852, revising and reducing into one act the provisions of the said charter, having been applicable to the said city and the council thereof ever since the enactment of the Code, (see Code, p. 287, § 26, Sess. Acts 1852, p. 259, § 1,) and authorized the

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said council to make such an ordinance as that which is complained of in this case. Such authority was also conferred by § 33 of the said act of March 30, 1852, Sess. Acts, p. 263. The record does not show when the ordinance in question was made; though it is stated in the petition for the *supersedeas* to have been made March 21st, 1851, and of course since the Code went into effect. If the fact had been otherwise, and been deemed material by the party who applied for the writ of prohibition, he should have taken care to have had it stated in the record; especially as the writ was awarded on his *ex parte* motion and petition, without notice.

There is some difference between the terms of the ordinance, as stated in the petition for the said writ, and the petition for the *supersedeas*. In the former, it is stated as declaring, that "no negro shall keep a cook-shop within said city," under the penalty of stripes, at the discretion of the mayor. In the latter, as declaring in the 3d section, that "no negro shall keep a cook-shop or eating-house, unless he be licensed to keep an ordinary or house of entertainment;" and in the 7th section, that the violation of the 3d section is to be punished with stripes. The ordinance, as stated in the former, wholly interdicts a free negro from keeping a cook-shop; as stated in the latter, it merely imposes a restriction upon his right to do so by requiring him to obtain a license to keep an ordinary or house of entertainment. The violation of the ordinance is stated in each to be punishable with stripes. Whether the ordinance be in the one or the other of these two forms, is immaterial. The council had a right to make it in either, if in their opinion necessary "to preserve peace and good order," or "to suppress gaming and tippling-houses," or "to prevent disorderly conduct," in the city. Having a right to make it for

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1855. that purpose, the presumption is that they did so make
January it, in the absence of evidence to the contrary.
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Cook-shops kept by free negroes, "being in effect *taverns*," in the language of the petition for the *super-sedeas*, "negro taverns of the lowest description, and"

liable to become "sources of infinite disorder and corruption among the black population, slave as well as free," the propriety and necessity of regulating, restraining, or wholly interdicting them in the city of Richmond, must be apparent to all.

There is nothing in the nature of the punishment which can render the ordinance unlawful. A free negro, in common with a slave, is punishable alone with stripes for certain misdemeanors enumerated in the Code, ch. 200, § 8, p. 754, and may be punished with stripes for any other misdemeanor. Id. ch. 212, § 14, p. 788. Stripes being the ordinary punishment inflicted by law upon a free negro for a misdemeanor, may properly be inflicted upon him for the violation of an ordinance of city police. But no objection is made to the nature of the punishment in this case, the only objection being on the supposed conflict between the ordinance and act of assembly, which I have endeavored to show does not exist.

It was suggested, in the course of the argument, that the effect of the writ of prohibition, and of the order overruling the motion to discharge it, was to acquit Clinton James of a criminal offense, and therefore no writ of error lies to reverse the order, upon the principle that no writ of error lies for the commonwealth in a criminal case, except in some particular cases in which the writ is given by statute; of which this is not one. I think that a consideration of the peculiar nature of the remedy by writ of prohibition will remove this difficulty: It is not a part or continuation of the prohibited proceeding, by removing it from one court to another for the purpose of

adjudication in the latter: But it is wholly collateral to that proceeding; and is intended to arrest it, and prevent its being further prosecuted in a court having no jurisdiction of the subject. It is, in effect, a proceeding between two courts—a superior and an inferior—and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law. The writ "issues," says Bacon, "out of the superior courts of common law to restrain the inferior courts, upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that gave it, are in such superior courts punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case." The object of it, "in general, is the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice."

It seems that a prohibition may be issued at the instance of a mere stranger; 8 Bac. Abr. Prohibition C; 7 Comy. Dig. Prohibition E; though it is generally, if not universally, issued at the instance of the party aggrieved. 3 Black. Com. 113; *Home v. Earl Camden*, 2 H. Bl. 533. It is directed to the judge before whom the plea complained of is pending, and to the party who prosecutes it, and commands the former not to hold, and the latter not to follow the plea. 3 Black. Com. 113. If the party applying for the

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1855. writ be directed to declare in prohibition, as he may
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merely upon a motion, (*Id.*) and it seems will be, on
the demand of the party against whom the applica-
tion is made; 7 Comy. Dig. Prohibition I; *Remington*
v. Dolby, 9 Q. B. 176, 58 Eng. C. L. R. 174, 178; *Arnold v. Shields, supra*; *Withers v. Commissioners of Roads*,
3 Brevard's R. 83; the proceeding then becomes an
action, which, in its origin, was a *qui tam* action,
founded on the fiction (which was not traversable,) that the defendant had proceeded in the suit after the
writ had been obtained and delivered to him; no such
writ having in fact been so obtained and delivered.
The action, in the form of it, was to recover damages of
the defendant for proceeding in contempt of the writ,
and to the injury of the plaintiff; but in substance,
it was a convenient mode of trying whether a prohi-
bition ought to issue; and it was made practicable by
considering all that related to the contempt, incurred
by proceeding after the writ had actually issued, as
mere form, and the damages nominal. *Home v. Earl*
Camden, supra. By a provision in the Code, 612, ch.
155, (similar to stat. 1 Will. iv. ch. 21, § 1,) the action
is stripped of its fictitious form, and only the sub-
stance of it now remains. It is thereby enacted that
the declaration shall be expressed to be on behalf
only of the party applying for the writ, and not on
behalf of him *and the commonwealth*; and shall set
forth so much only of the proceedings as may be ne-
cessary to show the ground of the application, *without*
alleging the delivery of a writ or any contempt; and shall
conclude by praying that a writ of prohibition may
issue; to which declaration the defendant may demur
or plead; and judgment shall be given that the writ
do or do not issue, as justice may require; and the
party in whose favor such judgment is given, whether
on verdict or otherwise, shall recover his costs; and

in case a verdict shall be given for the plaintiff, the jury may assess damages for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs.

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From the foregoing summary I think it must be manifest that the remedy by prohibition is distinct from and independent of, though collateral to, the proceeding sought to be prohibited; and that whether such proceeding be civil or criminal, (as it may be,) the nature, object and incidents of the remedy are the same; it being in either case a civil remedy to recover damages for the exercise of an unlawful jurisdiction, and to prevent the further exercise thereof.

The right of appeal is given by law in all cases of prohibition, and cannot be denied in a case in which the proceeding complained of is a criminal proceeding. Whether it be civil or criminal, damages and costs may be recovered against the defendant in prohibition; and he should have the same right to reverse the judgment for error therein in the one case as in the other. It is true that where the proceeding is criminal, the effect of the writ of prohibition may be to prevent the further prosecution of an offense by subjecting the judge of the inferior court and the prosecutor to an attachment for proceeding after the delivery of the writ to them. But this mere consequence of the writ is not an acquittal of the offense, (which has never in fact been tried;) and a *supersedeas* to the order awarding the writ, or refusing to discharge it, cannot be considered as a writ of error for the commonwealth in a criminal case.

The writ of prohibition was awarded in this case without first ruling the defendant to show cause against it. All the authorities seem to show that such a rule is necessary. 7 Comy. Dig. 169, Prohibition (H 1;) 8 Bac. Abr. 222, Prohibition (F;) 1 Saund. 136, n. 1; *Arnold v. Shields*, 5 Dana's R. 18; *Williams, ex parte*,

1855. 4 Pike's R. 542, 545. In the *State v. Allen*, 2 Ired.
January Term. Law R. 183, Gaston, J. speaking of the writ, said,
Mayo, "Such an act of authority will not be exerted, unless
mayor, a *prima facie* case, well verified, be first made out,
&c. showing an apparent necessity for this intervention;
v. nor unless an opportunity be afforded to those sought
James. to be prohibited, of showing cause against it. This
we understand to be a well settled rule of practice."

No inconvenience can result from requiring the rule, as the service of it will have the effect of staying the proceeding complained of until further order discharging the rule; and it seems that the defendant or the judge of the inferior court would be subject to an attachment for going on with the proceeding after such service and before such further order. 1 Saund. 136, n. 2; *Williams, ex parte*, 4 Pike's R. 543, 545.

The following would seem to be the proper course to be pursued on an application for a writ of prohibition to a Circuit court, or a judge thereof in vacation: The ground of the application should be set out in a proper suggestion, verified by affidavit, as to such material facts as do not appear on the record; or in affidavits instead of a suggestion, according to the Code, ch. 155, p. 612. If upon such suggestion or affidavits the court or judge be clearly of opinion that there is no good ground for a prohibition, it ought at once to be denied. But if otherwise, a rule should be made upon the adverse party to show cause why the writ should not be issued. The execution of the rule upon the party and the judge of the inferior court will have the effect of a prohibition *quousque*, or until the discharge of the rule. Upon the return of the rule executed, the court or judge will make it absolute or discharge it, as may then seem to be proper; and in the former case, may direct the applicant to declare in prohibition before writ issued; and ought to do so, if the defendant require it. If such direction be given,

the further proceedings in the case will of course be 1855.
in pursuance of the Code, ch. 155, p. 612. January Term.

I am for reversing the order, and discharging the
writ, with costs to the plaintiff in error, both in this
court and the Circuit court.

The other judges concurred in the opinion of
MONCURE, J.

JUDGMENT REVERSED.

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HAMTRAMCK v. SELDEN, WITHERS & CO.

(Absent DANIEL and LEE, Js.)

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1. To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at
 - a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action.
2. So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action.
3. It is not necessary to conclude such pleas as against the form of the statute.
4. Plaintiffs demur to pleas, and the demurrer is sustained; but upon appeal the judgment is reversed. The cause will be sent back with directions to permit the plaintiffs to withdraw the demurrer and reply, if they shall ask leave to do so.

This was an action of debt in the Circuit court of Jefferson county, brought by Selden, Withers & Co. against John F. Hamtramck as maker, and Alexander R. Boteler and others as endorsers, of a negotiable note for two thousand dollars. The declaration charged that on the 31st of December 1851, at Shepherdstown in the county of Jefferson, the note was made by the defendant Hamtramck, payable to Boteler at the bank of the Metropolis in the city of Washington, District of Columbia; and that on the same day, at the county aforesaid, it was endorsed by the respective endorsers.

The defendants appeared, and filed two special pleas. The first alleged that the plaintiffs, at the time of the making and delivery to them of the note

declared on, were an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note contrary to law and public policy.

The second plea alleged, that the consideration of the note declared on was the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company.

The plaintiffs demurred to the pleas, and the court sustained the demurrer, and rendered a judgment in their favor. Whereupon, Hamtramck applied to this court for a *supersedeas*, which was allowed.

Patton, for the appellants.

G. N. Johnson, for the appellees.

ALLEN, P. This is an action of debt against the maker and endorsers of a promissory note, dated at Shepherdstown, Virginia, on the 31st of December 1851, and negotiable and payable at the Bank of the Metropolis, Washington, D. C. The declaration is in the usual form, averring the making of the note and the endorsement to the plaintiffs below, at the county of Jefferson, Virginia.

On setting aside the office judgment, two special pleas were filed, which being received, the plaintiffs below demurred generally; and the demurrer being sustained, judgment was rendered against the defendants below for the debt. To this judgment a *supersedeas* has been awarded; and the sole question is, whether the pleas, or either of them, presented a substantial defense to the action.

The first plea avers that at the time of the making and delivery to them of the note in the declaration mentioned, the plaintiffs were an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public

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policy; and that they, as a banking company, discounted said note contrary to law and public policy.

The second plea avers that the consideration of the note in writing, in the declaration mentioned, was the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company.

The Code, p. 314, ch. 60, § 1, 2, provides that no association or company, other than a bank or banking company governed by the 58th chapter, shall issue, with intent that the same be circulated as currency, any note, bill, or other paper or thing, or otherwise deal, trade or carry on business as a bank of circulation. All contracts made for forming any such association shall be void. The 2nd section avoids all contracts and securities that may originate from, or be made or obtained in whole or in part by, means of any such dealing, trade or business.

The first plea avers that the plaintiffs were an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that as a banking company they discounted the note sued on. The plea pursues the terms of the law, and avers the plaintiffs were an unlawful association, doing what the law prohibited; and that as such unlawful association, they discounted the note sued on. The note made or obtained by means of such dealing, trade or business, is, by the 2nd section, declared to be void.

And so by the second plea, the consideration of the note sued on is averred to have been the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company; thus showing that the contract originated from, and the note was obtained by, means of bank paper issued by them against law.

It is argued that although the law of Virginia may avoid such a contract if the transaction occurs within

the state, yet the pleas in this case were defective, and the demurrer was properly sustained, because it does not appear from any averment in the plea, that the plaintiffs were an association organized in Virginia, or organized elsewhere, and circulating unlawful currency in Virginia; and that for anything appearing on the face of the pleas, the transaction may have occurred in the District of Columbia and may have been authorized by the laws in force there.

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The declaration avers the making of the note in Virginia, and that the endorsement by which the plaintiffs acquired title, was made in Virginia. And the title acquired by such making and endorsement is, by the second plea, averred to have been in consideration of their notes, unlawfully issued by them as currency. The promissory note is made payable and negotiable at the Bank of the Metropolis in the District of Columbia, but that circumstance does not justify the inference that the plaintiffs may not have had their place of business in Virginia, and dealt for the note in Virginia; or that having their place of business out of Virginia, this transaction could not have been performed by them or their agent in Virginia. If it occurred out of Virginia, it was incumbent on them to have shown it by replication. It was enough for the defendants to show by their pleas that the transaction, as set forth in the declaration, was void by the laws of the state, the tribunals of which were invoked to enforce it. If the transaction was to be controlled and governed by the law of another country where it was lawful, the matter should appear by replications to the pleas; or the parties by proper pleadings could have raised the question adverted to in the argument, whether the courts of Virginia would enforce the penal laws of another state in regard to such a transaction, supposing it to be controlled by the law of such state: Upon the pleadings in the record these questions do not arise.

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It is further maintained that the pleas are defective for not concluding against the form of the statute. That the defense is founded on a penal statute, and should be assimilated to a declaration in a *qui tam* action for a penalty, where it has been held that the declaration must contain such averment. However this may be at common law, the omission is rather one of form than substance. Certainly the averment omitted is not so essential to the defense that judgment according to law and the very right of the cause cannot be given. The pleas aver all the facts which by law constitute a full defense to the action; and the statute being a public statute, the court must judicially take notice of it. In *qui tam* actions the same technicality was required as in indictments founded on such statutes; and hence the necessity of averring the act to be against the form of the statute. But this is now no longer required in indictments. The Code, p. 770, ch. 207, § 11, provides that no indictment shall be quashed, or deemed invalid, for omitting to charge the offense to be against the form of the statute: showing that the averment even in indictments was merely formal. I think the court erred in sustaining the general demurrer to the pleas filed, and that the judgment should be reversed. And under the authority of *Creel v. Brown*, 1 Rob. R. 265, *Strange v. Floyd*, 9 Gratt. 474, and other cases in this court, the cause should be remanded with instructions to overrule the demurrer, and render judgment for the defendants below on their pleas, unless the plaintiffs below should ask leave to withdraw their demurrer and reply; which, if asked for, should be granted.

MONCURE and SAMUELS, Js. concurred in the opinion of ALLEN, P.

JUDGMENT REVERSED, and cause remanded.

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1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.
2. The slaves allotted to the widow are not a part of the distributable surplus to be divided amongst the children at the death of the intestate; and a child refusing to bring his advancements into hotchpot upon the first division, is not thereby precluded from claiming to share in the division of the dower slaves.
3. **Quere:** If this right to postpone his election whether or not he will take a share of the estate, exists as to any other estate than the dower slaves.
4. A child having received advancements, and refusing to share in the first division, but claiming to share in the division of the dower slaves, is to be charged with interest on his advancements or their value, from the death of the intestate to the date of the division: And if the principal and interest of his advancements exceed the amount received by the other children, he is then to be charged with interest on such excess from that time to the period of the second division. But having elected not to come in on the first division, if his advancements with interest thereon were not equal to the shares of the other children on that division, he is not entitled to have the deficiency made up on the second division.

William Carter died in 1817 intestate, leaving a widow and ten children; and his son in law John H. Knight qualified as administrator upon his estate. In 1818 the widow and all the children, except Mrs. Knight, filed a bill in the County court of Nottoway for an allotment to the widow of her thirds of the estate, and a distribution of the residue among the children. In their bill they charge that John H. Knight had been advanced by their father a full proportion of the personal estate, and chose not to bring his advancements into distribution; so that he was

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not entitled to any share in the property. And they ask for a distribution excluding him.

Knight as administrator was the only defendant to the suit; and he answered in three lines, admitting the allegations of the bill to be correct, and consenting to the decree prayed for by the plaintiffs. The decree was accordingly made; and one-third of the slaves and other property was allotted to the widow, and the residue of the personal property was divided among the other nine children, excluding Knight and wife from the division.

Mrs. Carter lived until 1851; when the slaves which had been allotted to her on the division of the estate in 1818, amounted to thirty-three. In the mean time two of the children had died, unmarried and intestate. A suit was then instituted for the division of these slaves among the distributees of William Carter; and in this suit the question arose, whether Knight and wife were entitled to a distributable share of these slaves, or were concluded by Knight's election in 1818 not to bring his advancements into the distribution. Knight insisted that his election extended only to the property distributed among the children in 1818; and that in fact he had not received as much as the other children received on that division: And he filed a statement of what he had received, and introduced evidence to sustain it.

The commissioners divided the slaves into eight shares, one of which they allotted to Knight and wife; and they submitted to the court the question of the right of Knight and wife to participate in the distribution.

The cause came on to be finally heard in September 1852, when the court below held that Knight and wife were not entitled to a share of these slaves as distributees of William Carter, though they were entitled to share in the portions of the two children

who had died unmarried and intestate: And a decree was made confirming the report as to the shares of the other parties; and directing the share allotted to Knight and wife to be sold; and that out of the proceeds of sale they should be paid their proportion of the shares of the two who had died; and the remainder of said proceeds of sale should be divided among the other distributees of William Carter. From this decree Knight and wife applied to this court for an appeal, which was awarded.

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Patton, for the appellants.

Gohlson, for the appellees.

DANIEL, J. At the time when the proceedings in reference to the first division of the estate of William Carter deceased were had in the County court of Nottoway, the distribution of intestates' estates was governed by the act of 1785, which was re-enacted in 1792. The 27th section of the act provides, that "when any person shall die intestate as to his goods and chattels, or any part thereof, after funeral debts and just expenses paid, if there be no child, one moiety, or if there be a child or children, one-third, of the surplus shall go to the wife; but she shall have no more than the use, for her life, of such slaves as shall be in her share; and the residue of the surplus, and after the wife's death, the slaves in her share, or, if there be no wife, then the whole of such surplus shall be distributed in the same proportions and to the same persons as lands are directed to descend in and by an act of assembly entitled 'an act to reduce into one the several acts directing the course of descents.'"

And when any children of the intestate or their issue shall have received, from the intestate in his lifetime, any personal estate by way of advancement, and

1855. shall choose to come into the distribution with the other persons entitled, such advancements shall be brought into hotchpot with the distributable surplus.

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Knight & wife v. Oliver & als. In the bill filed by the widow Jane Carter, and the distributees, (other than John H. Knight and wife,) it is alleged that Knight, in the lifetime of the intestate William Carter, intermarried with Sally E. Carter, one of the daughters of the said William, and was by him advanced to a full proportion of the personal estate of the intestate, and chooses not to bring the same into distribution, so that he is not entitled to any share in the said property. And Knight, who in his character of administrator of the intestate, is the only defendant made to the bill, (his wife being no party,) in his answer, (which is styled the answer of John H. Knight, administrator of William Carter deceased,) says, that "he admits the allegations of the bill are correct, and hath no objection to the decree therein prayed for." The controversy, it is obvious, turns mainly on the legal extent and effect of Knight's admission. And it is equally obvious, that the extent to which such admission ought to be construed as designed to bind him, and the legal effect of the admission on the rights of the parties in the controversy, must depend very much on the answer to be given to the question, What were the rights of the several parties in respect to Knight's advancements at the time of the first division?

And first, in respect to the widow of the decedent. I do not think that the admission of Knight had or could have had any manner of bearing or influence on her rights. His consent or refusal to collate his advancements could not have affected the estate or funds out of which her thirds were to be allotted. Her share must have been the same, whether he elected to come into hotchpot at the first division or not. The question whether the widow has any interest in the

advancements which may be brought into the division, has never as yet, I believe, been decided by this court: but there is little doubt as to the propriety of an answer in the negative. The law which has been already cited, plainly marks out her share as being one-third of the surplus of the goods and chattels of the intestate, which shall be after funeral debts and just expenses paid: And in no legal sense can advancements, made by the decedent to his children in his lifetime, be said to constitute part of "*his goods and chattels*" as to which he died intestate. Such advancements are, to all intents, the property of the children to whom they have been made, and no longer the property of the parent who made them.

The propriety of this construction is, if possible, rendered still more manifest by a reference to previous legislation on the subject. The act for the distribution of intestates' estates, passed in 1748, 5 Hen. St. 444, provides that "one-third of the surplus of the personal estate (other than slaves) shall go to the wife," and that "all the residue shall be distributed in equal proportion to and among the children of the intestate; and in case any such child or children be then dead, to such persons as legally represent them, other than such child or children who have had any estate settlement or portion from the intestate in his lifetime, equal in value to the share, arising by such distribution, to each of the other children: But if such estate settlement or portion be of less value than such child or children shall be entitled to, so much of the surplus aforesaid as shall make his, her or their share or shares equal to the share of each of the other children as near as can be estimated; and the heir at law, notwithstanding any land he may have by descent or otherwise from the intestate, shall nevertheless have an equal part in the distribution with the rest of the children, without any consideration of the value of

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1855. the land." The language employed in the act of
January 1705, "for the distribution of intestate's estates," 3
Term. Hen. St. 871, in reference to the particulars under

Knight & wife consideration, is of like import: And it is, I think,
v. very clear that the provisions in both of said last men-
Oliver & als. tioned acts, (those of 1748 and 1705,) in reference to
the advancements, were made without any design to
affect the widow's share, and solely with the design of
bringing about equality in the distribution of the sur-
plus among the children of the intestate. And though
the new provision in respect to the advancements, in
the act of 1785, requiring the children who have been
advanced to elect whether they will come into distri-
bution, might, if read alone, create some doubt whether
the advancements, when brought in, are not to form a
part of the estate out of which the widow and chil-
dren are all to take their shares, yet when we look to
the preceding clause of the section under considera-
tion, we find nothing there to denote a change of the
policy observed in the previous laws, in respect to the
widow's rights. On the contrary, her rights are there
clearly defined, and a manifest purpose is shown to
leave them wholly unaffected by the new regulation
adopted for the purpose of equalizing the shares of the
children.

The terms "the distributable surplus," found in the
last clause of the section, are, I think, identical in
meaning with the terms "the residue of the surplus,"
used in the first clause, in case there be a wife, and
with the terms "the whole of such surplus," if there
be no wife, of the intestate; and the words "other
persons entitled," employed in the last clause, serve
to designate the same persons that are described in the
first, by the terms "to the same persons that lands are
directed to descend," &c. to wit: the children of the
intestate, if any: and have no reference to the wife.

This rule, denying to the widow any interest in the

property advanced to the children, prevails in England under the construction given to her statute of distributions; *Kircudbright v. Kircudbright*, 8 Ves. R. 51; and has been adopted in Massachusetts, Tennessee, Alabama, Georgia and South Carolina; and also, I believe, in other states of the Union. *Stearns v. Stearns*, 1 Pick. R. 157; *Brunson v. Brunson*, Meigs' R. 630; *Logan v. Logan*, 13 Alab. R. 653; 15 Id. 85; *Beavers v. Winn*, 9 Georgia R. 187; *Ex parte Lawton*, 3 Dess. R. 199.

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The language employed in the South Carolina act is very similar to that used in our act of 1785; and the reasoning of the chancellor in the case last cited, bears with full force on the question under consideration. After reciting the act of his state, he says, "the effect of the provision is to equalize all the children of the testator by diminishing the quantity of property to be given to a child who has been advanced by the parent, exactly so much as has been given him in advance."—"The widow is to take a third of whatever estate the intestate is possessed of, interested in, or entitled to, at the time of his death, and no more or other estate; nor does the first recited clause, making provision for the case of children who had been advanced, have any relation to the widow: that was intended merely as a rule of equalization among the children. The widow is to take, in all events, a third of what is left, and the children the remaining two-thirds. The proportion in which the children take those two-thirds is of no importance to the widow; but it is of importance to natural justice, legitimated by our act of assembly, that the children should receive equal portions of the parent's property. Hence the necessity of a rule for the division of the two-thirds part of the intestate's estate, intended for the children, which should prevent those who have been advanced, receiving as much of the two-thirds as those who have not been advanced: And the clause

1855. of the act regulating this point and furnishing the
January rule, expressly confines its provisions to the children,
Term. and says nothing of the share of the widow which
had been definitively fixed by the preceding clause."

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The reasoning of the Supreme court of Georgia in the case of *Beavers v. Winn & others*, cited above, seems equally applicable to questions arising under our act. "The estate (says the court) subject to distribution is the property belonging to the decedent at his death. A *gift* of property to a child as effectually passes the title out of the parent as any other mode of alienation. An *advance*, that is, a transfer of property to a child, divests the parent and invests the child with the title. The property is no longer in the father. It is no part of his estate whilst he lives. He cannot revoke the title, if he would. The property belongs to the child, and is subject to his debt. The widow being entitled to share equally in *the estate of the decedent* only, by what right does she claim an interest in the advancement? As well might she claim an interest in the property of the advanced child, acquired by purchase. This view is strongly fortified by the fact, that under no law is the advanced child compellable to bring the portion given to him back into the common stock, even at the instance of children. Whatever he has got, whether less or more than his proportion of the estate, he can keep. It is his own. If less, of course he would bring it back, for by so doing only can he get his full share by the law of hotchpot. If he chooses though not to do so against his interests, he has the right so not to do." "It would seem that if the widow is entitled to share in advancements made to children, children ought to be entitled to share in settlements made upon the wife during coverture: The rights of the parties ought to be reciprocal. But settlements made upon the wife during the coverture are no part of the estate." And for any apparent injustice done to the widow by leav-

ing her no interest in the advancements, (the opinion proceeds to show,) compensation is made by allowing her to hold on to any settlements which may have been made in her favor.

These views of the rights of the widow of the intestate show that she had no manner of concern in Knight's choosing or declining to come into hotchpot in the division of 1818; and the allegations of the bill and admissions of the answer in respect to his advancements, and to his electing not to come into the division, were, consequently, so far as Mrs. Carter was concerned, wholly foreign to the object contemplated by the proceedings then had.

Let us next enquire whether or no the children had a right in such a bill as that filed in 1818, to insist that Knight should then make his election, in order to entitle him to an interest, or rather to preserve the interest which he then had in the remainder or reversion, after the life of the widow, in the slaves allotted to her share.

The statute plainly contemplates two allotments and distributions in such a case as we have here. The words of the statute, as before cited, are "the residue of the surplus, and after the wife's death, the slaves in her share, or if there be no wife, then the whole of the surplus shall be distributed," &c.

If there be no wife, there is to be but one distribution, and that is of the whole of the surplus, after the payment of debts, &c. If there be a wife, the residue, after taking out her share, is to be distributed presently, and the slaves in her share are to be distributed after her death.

The persons entitled to distribution might, in a case of the kind, no doubt, by consent, settle and adjust all their interests in the property, present and prospective, by one proceeding—one allotment and division. They might fix, by estimate, upon the present

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value of the reversion in each slave in the widow's share, and agree each to hold in severalty a reversionary right in a particular slave or parcel of slaves, (and the increase if any,) and thus anticipate, and dispense with the necessity of any farther proceedings for a division at the death of the widow. But an allotment or division of this kind is not the "distribution" contemplated by the statute. Certainly no such allotment was sought by the parties or decreed by the court in the friendly suit of 1818. The parties sought, and the court decreed the allotment and distribution only of that portion of the surplus, the possession whereof might be then taken, and presently enjoyed, by the respective distributees, leaving the slaves in the widow's share for allotment and distribution, at her death, among those entitled.

It not unfrequently happens that the administrator, at the time of the division, is ready to close his administration; and in such cases he is allowed to hand over, for distribution, bonds, notes and other evidences of debt belonging to the estate, whether they are then payable or not; which are at once distributed; but I apprehend that no practice ever could have obtained, in such proceedings, of allotting among the children, in severalty, as part of their lot or shares, the reversionary right to the slaves in the widow's share, or of treating such right as a subject to be valued on for the purpose of producing equality in the distribution. That equality is brought about in a manner wholly different. If the subjects to be distributed are not so divisible as to be susceptible of severance into parcels exactly equal in value, the distributees, whose lots exceed in value their due proportions, pay over the excess to those whose lots fall short of that proportion.

To compel a child, then, whose advancements exceed his share in the property to be divided at the first distribution, but do not equal his share in the

whole, including the slaves in the widow's share, to bring in such advancements at such distribution, as the condition of keeping alive his right to participate in the distribution of the slaves at the widow's death, is to force him to pay presently for an undivided interest in a subject, the distribution of which is postponed to an uncertain, and in all probability a distant day. Such a requirement would seem to be at war with the nature of that bringing together into hotchpot and distribution, of the estate of the intestate, advancements of the children, usually contemplated and effected by such proceedings as those had in the suit of 1818. The prominent idea suggested by a going into hotchpot, is that of a collation and division of subjects susceptible of immediate distribution among those entitled, and not that of an ascertainment or adjudication of the mere rights of the parties to property which does not then admit of such distribution. And an advanced child, made a defendant to such a suit as that of 1818, might well suppose that the only effect of his declining to carry his advancements into the collation, would be to debar him of any participation in the distribution then to be had, and not to deprive him of a right thereafter to claim his interest in an estate which, from its very nature, was not then ready for distribution.

I do not wish to be understood as intimating that in no case can an advanced child be compelled to elect, in anticipation, whether or no he will carry in his advancements as the condition of acquiring or preserving an interest in a reversion. I can readily conceive how it might be of great importance to the other children, or some of them, to have the precise extent of their several interests in such a reversion ascertained and defined. Their wants or comforts might require that they should realize the value of their estate by a sale, which could not be judiciously made so long as doubt

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and uncertainty existed as to the number of persons entitled to the reversion. I do not mean to say that, in such a state of things, upon a bill filed containing the proper allegations and setting forth distinctly the objects of the suit, a court of equity might not compel an advanced child to elect whether he would hold on to his advancements, or bring them in, and claim his interest in the reversion. But in such a case the court, I presume, would not proceed to a decree without first taking the steps proper to be observed, and affording opportunity for the exhibition of the *data* proper to be considered, in making up an estimate of the probable value of the reversion, unless otherwise satisfied that the defendant was prepared to act understandingly and deliberately in making his election.

On the other hand, cases may be supposed in which it would seem to be manifestly harsh and unjust to the advanced child to constrain his election by proceedings however regular. As in the case of an intestate dying, leaving property of trifling value in possession, but a claim to a large estate in suit. Would a court of equity, in such a state of things, force upon a child, who had received an advancement in the lifetime of the intestate, more than equal to his proportion of the property at present to be distributed, the alternative either of paying down the excess as the price of an interest in a suit which may result in nothing, or of abandoning such interest, and thereby losing what may turn out to be a fortune? I should think not. Sales of expectant and uncertain interests are watched with jealousy by courts of equity; and trifling circumstances, added to inadequacy of price, have, in many cases, been held sufficient to vacate them: And how, in principle and result, would the choice, by the advanced child, of the latter alternative, in the case just supposed, differ from such a sale? He might be giving away a large

patrimony for the privilege of retaining an advantage or benefit comparatively insignificant in value. In forcing a child into such an election, a court of equity would (it seems to me) be departing from one of its wisest rules, and giving encouragement to a species of speculation which it has hitherto shown the greatest anxiety to discountenance and restrain.

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The law of hotchpot, as I understand it, does not call for or sanction such a departure. It is founded in sentiments of natural justice and equity, and proposes for its end exact equality of benefit among those who stand in the same degrees of relationship to the persons over the distribution of whose estates it takes control. It prescribes the rules for equalizing the distribution of property susceptible of distribution, and does not (except in special cases) contemplate the valuation and adjustment of contingent, uncertain or expectant interests.

These views have led my mind to the conclusion that Knight and wife were not debarred by the division of 1818 from a right to participate in that of 1852. The allegations of the bill and the admissions of the answer in the suit of 1818 are sufficiently broad to embrace the interests of the parties in the whole personal estate of the intestate, as well as that then ready for distribution as that allotted to the widow's share; but looking to the rights of the several parties and to the objects most probably contemplated by them, I think that their allegations and admissions in respect to Knight's advancements, and his choosing not to bring the same into distribution, ought to be construed as referring to the two-thirds of the surplus then to be distributed, and not as extending also to the slaves in the widow's share.

The question is one of the first impression. In England the institution of slavery does not exist, and there the share which the wife takes in the per-

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sonal estate of her deceased husband, in case of his intestacy, is absolute. No precedent, therefore, for governing such a case as this can be derived from that source. The same may be said of many of our sister states; and in none of the slaveholding states, where laws, in relation to the subject, similar to our own, prevail, does the question appear to have been yet decided. In the absence of authority, I have felt free to adopt that rule which seemed to me to be the most likely to attain the equitable end proposed by our statute.

It was urged at the bar that such a construction of the law gives to an advanced child an undue advantage over the other children. That in all cases of the kind the advanced children, if their advancements exceeded their shares of the surplus to be distributed in the first division, would hold off and await the termination of the life estate. If the slaves had increased in the mean time so as to make it to their interest to bring in their advancements and claim a share, they would do so; if not, they would hold on to their advancements. That the advanced children would thus stand in a condition of perfect safety, whilst the others might sustain loss by a diminution in the value of the slaves. To this it was answered that the advanced children acquired this advantage by the gift of their parent in his lifetime, who had a right, if so disposed, to have given them his whole estate in exclusion of the other children; and that the like hardship (if hardship it be) may occur in any case of intestacy where there are advanced children, whether there be several distributions of the intestates' property, or only one. For if there be but one division, still till that division is had, the advanced children hold their advancements, no matter how long it may have been since they received them. If the residue of the property which the intestate kept in his hands, has swelled in the in-

terval, into a large estate, they may carry in their advancements and claim their shares. If, on the other hand, it has dwindled away so as to be of little or no value, they may refuse to go into the division; and thus retain their advancements without giving any just cause of complaint to the other children.

Cases may be supposed, where, from the very nature and condition of the estate left by the intestate, the advanced children might continue lawfully to hold this position of supposed advantage for a long period after the death of the intestate; as where the only property or right of property left by him is a suit, or where his whole estate consists of a remainder or reversion after the expiration of a particular estate which at his death had not determined. And I do not see how the argument founded on the supposed undue advantage in favor of the advanced children, applies with any greater force to the position which they occupy in respect to the slaves in the widow's share, than it does to that which they would hold, in the cases just put, in reference to the uncertain or expectant interests there mentioned.

And if considerations of possible hardship to the unadvanced children, growing out of the construction which I would give to the law, still present themselves as objections to its adoption, it seems to me they are greatly overweighed by views of the manifest injustice to the advanced child, which might be done, under the working of the opposite construction. Under the first mentioned construction, the unadvanced children could in no state of things be deprived of their equal shares in the estate left by the intestate undisposed of. In case the advanced children should elect not to go into hotchpot at the last division, the other children would get the whole estate left by the intestate. If the advanced children, on the other hand, should go into the division, then the other chil-

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1855. dren would get their equal shares not only of the estate left, but also of that advanced in his lifetime, by January Term.

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the intestate. In no case are the unadvanced children exposed to the great hazard which must be encountered by the advanced children, and which may, in some cases, as we have shown, eventuate in the loss to them of interests of great value, if they are forced into speculative elections respecting uncertain, contingent or expectant estates.

A serious objection to forcing an advanced child into an election respecting such interests, is to be found in the consideration that his pecuniary condition might be such as to forbid his making a free, even if he could make an intelligent and well informed election in the matter. He might from his straitened circumstances, be wholly unable to pay, presently, the excess of his advancement over and above his share of the property about to be distributed, and would thus be constrained, by necessity, and not by the election and choice of his judgment, to forego the acquisition or preservation of that which, if left free to choose, he would regard and elect to take as an interest of great prospective value.

Upon the whole, without any particular consideration of the question discussed at the bar, whether a married woman, who is no party to the proceedings, could be bound by the election of her husband in respect to her reversionary interest in the slaves in the widow's share, (the decision of that question being, in the view I take of the case, unnecessary,) I think that the court erred in its decree of September 1852, in excluding Knight and wife from a participation in the division of the slaves in Mrs. Carter's share; and in decreeing the proceeds of the slaves in the lot assigned to the appellants by the commissioners, to be distributed among the appellees. It also seems to me that Knight and wife have, by

their answer to the bill in the suit of 1818, precluded themselves from any right to show that their advancements were not equal in value to the shares of the other children respectively in the surplus then distributed. And as testimony has been taken on both sides in respect to said advancements, and has not resulted, as it seems to me, in providing that they were of greater value than the shares of the other children in said surplus, the errors of the Circuit court would, in my view, be corrected simply by reversing so much of the decree of September 1852 as decrees the proceeds of the slaves allotted to the appellants by the commissioners to be distributed among the appellees, and decreeing the same to be paid to the appellants. But whilst a majority of the court concur with me in holding that Knight and wife ought not to be excluded from participating in the division of the slaves in Mrs. Carter's share, they are also of opinion that the other children are entitled (if any of them so desire) to have an account of Knight's advancements; and that the cause should be remanded, with liberty to the appellees to call for such an account, and to show, if they can, that Knight's advancements exceeded in value the shares distributed to the other children respectively in the division of 1818. That in stating the account, Knight should be charged with his advancements as of the date of the death of the intestate, and with interest thereon from said date to that of the division in 1818. And if the aggregate of said advancements and interest are found to exceed the value of the shares aforesaid respectively, such excess, together with interest thereon from the last mentioned date to the first of January 1852, the date of the decree for the division of the slaves in Mrs. Carter's share, should be charged to the appellants, as the advancement to be accounted for before receiving any share in the proceeds of said slaves. But that

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if on taking said account it should result in showing that Knight's advancements do not exceed in value the shares allotted to the other children in the division of 1818, or if no such account be called for, then the Circuit court should decree the proceeds of the slaves allotted to Knight and wife by the commissioners under the decree of January 1852 to be paid to them. And the decree which I have prepared is in accordance with the last mentioned opinion.

LEE, J. concurred in the results of the opinion of Judge DANIEL; and also in the reasoning upon the question of postponing the election, as applied to slaves allotted to the widow.

MONCURE, J. concurred in the results of the opinion and in most of the reasoning, on the ground of the peculiar nature of slave property. He thought an advanced child might postpone his election until the division of the dower slaves. He was rather inclined to think that in the case stated by Judge DANIEL by way of illustration, the advanced child would not be entitled to postpone his election.

ALLEN, P. concurred in the results of the opinion, and also in the reasoning, except the case stated as an illustration; and was rather inclined to think that correct.

SAMUELS, J. dissented. He was for affirming the decree.

The decree was as follows:

It seems to the court, that the appellants ought not to be estopped by the answer of the male appellant, filed in the suit brought by Jane Carter, Lyddall Bacon and others, in the County court of Nottoway,

in January 1818, or by any other matter appearing in the cause, from participating in the distribution of the slaves assigned and allotted to Mrs. Carter in said suit, as her third part of the slaves of her deceased husband William Carter; and consequently that so much of the decree of the 5th of October 1852, as decides that they are not entitled to such participation, and decrees the proceeds of the slaves allotted to the appellants by the commissioners in pursuance of the interlocutory order of the 1st of January 1852, is erroneous; and the said decree is reversed in said particulars, and affirmed as to the residue, with costs.

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And it seeming further to the court, that before passing finally on the rights of the parties it would be right to allow the appellees to have an account of advancements made by the intestate William Carter in his lifetime, to the appellant Knight, if they or any of them shall so desire, and that whilst Knight, by his answer in the suit of 1818, before mentioned, has estopped himself from showing that such advancements are not equal in value to the respective shares received by the distributees in said suit, the appellees ought yet to be allowed to show, if they can, that said advancements were of greater value, the cause is remanded for further proceedings. And liberty is given to the appellees or either of them, to call for said account, and to show before the commissioners by any competent proofs, the value of said advancements.

In stating said account, the appellants are to be charged with said advancements as of the date of the death of the intestate, with interest thereon to the 1st of January, the date of the filing of the bill in the suit for a division in the County court of Nottoway, before mentioned; and if the aggregate of said advancements and interest shall be found to exceed in value the respective shares allotted to the

1855. January Term. distributees in said division, then such excess, together with interest thereon from the said 1st January 1818 to the 1st of January 1852, the date of the filing of the bill in this cause, is to be treated as the amount of advancements with which the appellants are to be charged before receiving, as distributees of the intestate, any part of the proceeds of the slaves allotted to them by the commissioners, in pursuance of the interlocutory order of the last mentioned date. If, however, on taking said account, it is made to appear that the advancements stated on the principles above indicated, did not, in January 1818, exceed the shares received by the distributees respectively, in the division aforesaid of that date; or if said account is not called for, the Circuit court is to render a decree in favor of the appellants for the proceeds of the slaves aforesaid, allotted to them by the commissioners as aforesaid.

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(Absent SAMUELS, J.*)

January 29.

1. A judgment by confession entered by mistake of the clerk instead of a judgment upon *nil dicit*, cannot be corrected at the next term of the court, under either the first or the fifth sections of ch. 181 of the Code, p. 680.
2. An entry that the defendant relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of &c. and judgment accordingly, is a judgment by confession, and releases all previous errors in the proceedings in the cause.
3. In an action of debt against two, one dies, and the suit is revived against his administratrix; and then she and the other defendant give separate confessions of judgments, and a separate judgment is entered against each. This is not error.

The case is fully stated by Judge LEE in his opinion.

The case was submitted upon the petition by *Morson*, for the appellant.

There was no counsel for the appellee.

LEE, J. This is an action of debt brought in the Circuit court of Clarke county by James Jones against John Richardson and Thornton P. Pendleton, upon a single bill for the sum of five hundred and eighteen dollars and fifty-seven cents. The defendants appeared and filed the plea of payment, upon which issue was joined. At the May term 1849, the death of the defendant Richardson was suggested; and subsequently a *scire facias* was sued out against Mary Richardson his executrix, to show cause why the suit should not

* He rendered the first judgment in the case.

1855. be revived against her. This process was returned
January executed, and at the October term an order was made
Term. reviving the cause against her as such executrix. An

Richard- amended declaration was then filed by the plaintiff,
son's ex'x & al. and a special plea by the defendants. To this special
v. Jones. plea a special demurrer was filed, and the defendants
joined in the demurrer. At the October term 1851
this demurrer was argued and was overruled by the
court; and upon the following day in the same term
an entry was made to the following effect: "Came
the parties by their attorneys and the defendant the
executrix of John Richardson deceased, relinquishing
her plea of payment saith she cannot gainsay the
plaintiff's action for the sum of five hundred and
eighteen dollars and fifty-seven cents, with interest
from the 7th day of March 1843 till paid and the
costs." And judgment accordingly was entered up
against her to be levied of the goods of her testator,
&c. And upon the same day a similar entry was
made as to the defendant Pendleton, and judgment
entered up against him for the same debt, interest and
costs. At the following term of the court, that is to
say, on the 2nd of May 1852, the following entry was
made: "On motion of the defendant, (the plaintiff
having notice,) and it appearing to the satisfaction of
the court that the judgment rendered in this cause at
the last term was erroneous by an error of the clerk
in entering the same as a judgment by confession, it
is ordered that the same be set aside and the following
entry made *nunc pro tunc*: This day came the plaintiff
by his attorney, and the defendant withdrawing the
plea of payment, saith nothing in bar, whereby the
plaintiff remains thereof undefended: Therefore it
is considered by the court that the plaintiff recover
against the defendant" the debt, interest and costs
specified in the two former judgments. The defen-

dants then applied for and obtained a *supersedeas* from this court.

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The action of the court at the May term 1852 in setting aside the judgment of the previous term, and rendering a new judgment in lieu thereof, was founded, it may be presumed, upon the idea that the case was within the fifth section of ch. 181 of the Code, p. 681 authorizing the reversal and amendment of judgments in certain cases in the same court, at a subsequent term, or by the judge in vacation, or upon the notion that the supposed error in the judgments was one proper to be corrected by a writ of error *coram nobis*, and therefore might be made the subject of a summary proceeding by motion under the first section of the chapter above mentioned. I think it can be sustained upon neither. The judgment rendered at the October term (if the two several judgments then entered may be regarded as constituting one final judgment,) was set aside because it appeared to the satisfaction of the court, that it was improperly entered as a judgment by confession by an error of the clerk. This was a matter which could not appear from the record as it stood, but must have been shown in proof; and in such a case no reversal or amendment could be effected under the fifth section, which only applies where the supposed error appears in some part of the record. So recently held by this court in *Powell's* case, 11 Gratt. 822. Nor was it a proper case for a writ of error *coram nobis*. This writ lies where some defect is alleged in the process or the execution thereof, or some misprision of the clerk, or some error in the proceedings arising from a fact not appearing upon their face, as where judgment is rendered against a party after his death, or who is an infant or *feme covert*. *Gordon v. Frazier*, 2 Wash. 130; *Bent v. Patten*, 1 Rand. 25; *Tidd's P. F.* 513. But it does not lie to correct any error in the judgment

1855. of the court, nor to contradict or put in issue a fact
January directly passed upon and affirmed in the judgment
Term. itself. If this could be done there would be no end
Richard- to litigation, and little security for the titles to pro-
son's ex'x perty. Accordingly it is a well settled doctrine, that
& al. where a matter is plainly, directly and unequivocally
v. Jones. affirmed by the judgment of a court of record, the
record in itself imports such uncontrollable credit and
verity that it admits of no averment, plea or proof to
the contrary. Coke Litt. 260 a; *Field v. Gibbs*, Pet.
C. C. R. 155; *Wood v. Jackson*, 8 Wend. R. 1. And
it has been held in this court, that where in an entry
of a judgment against a principal and his sureties,
the latter of whom appeared by an attorney in fact
under a power, who confessed judgment for them, it
was expressed that such judgment was with a stay
of execution for a given time, it was not competent
even in a court of equity to aver or prove that so
much of the entry as related to the stay of execution
was without the consent of the attorney for the sure-
ties. *Calwells v. Shields & Sommerville*, 2 Rob. R. 305.

In this case the ground of the motion to set aside
the judgment, was that the defendants had not said
they could not gainsay the plaintiff's action, as the
record stated; and that the entry of judgment there-
upon as by confession was through an error of the
clerk. It was thus sought directly to contradict the
record by evidence *alibi*, and to prove that what it
asserted was not true. This we have seen could not
be done. Nor can the error be regarded as a mere
clerical misprision. If there were such error it con-
sisted, in the legal sense, in the courts rendering a
judgment as by confession, if such was the character
of the judgment, where no acknowledgment of the
plaintiff's action had been in fact made; and this was
a matter not to be put in issue upon a writ of error
coram nobis or the motion substituted in its place.

I think therefore the Circuit court erred in its order of the 2d of May 1852, and in proceeding to render a new judgment in lieu of those which it undertook by that order to set aside.

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This brings us to the two several judgments rendered on the 16th of October 1851. It is insisted on behalf of the plaintiffs in error, that there are various irregularities in the proceedings for which they also should be reversed. But a preliminary enquiry arises as to the true nature and character of these judgments. For if as the court in its order of the 2d May 1852 assumed, they are to be regarded as judgments by confession, they will not be disturbed by reason of any previous errors or irregularities that may have occurred in the proceedings; because by our statute a judgment by confession is equal to a release of errors. Code, ch. 181, § 2, p. 680. I think they are plainly judgments by confession. Judgment in an action at law for the plaintiff, is either by default for want of plea after appearance, or *nil dicit* as it is termed, or under our statute, by default for failure to appear after having been duly summoned, or by *non sum informatus* where the defendant's attorney having appeared says he is not informed of any answer to be given to the action, or by confession or *cognovit actionem*. 1 Tidd's Pr. 609; 2 Id. 962; 2 Tuck. Com. 320; Code, ch. 171, § 42, p. 651. The judgments here were not of either of the three classes first named, but the defendants severally appeared and relinquishing their plea previously pleaded, said they could not gainsay the plaintiff's action for a specified sum with interest from a particular time and costs of suit. This was fully equivalent to an express acknowledgment of the action for so much, and it will be found that the judgments as rendered conform very nearly to the precedents of a judgment upon a *cognovit actionem* to be found in the books of Pleadings

1855. and Entries. See 2 Lilly's Ent. 470, 485; 10 Went. Plead. 450, 453; Tidd's Pract. Forms 191, 192. All enquiry into the regularity of the previous proceedings is thus closed, and the only question that can be made is as to the regularity of several judgments against the defendants. The acknowledgment of the action was not made by them conjointly but by each severally, by the executrix of Richardson for the estate of her testator, and Pendleton for himself; and I can perceive no good reason why the judgments should not be entered up severally as the acknowledgments were made. Where two parties are bound by joint contract and one dies, by the common law rule the representative of the party so dying would be discharged from liability. 7 Bac. Abr. "Obligations," (D) 4, Bouv. ed. p. 249; *Foster v. Hooper*, 2 Mass. R. 572; *Aticell's adm'r v. Milton*, 4 Hen. & Munf. 253. By our statute, however, such representative may be charged in the same manner as he might have been if the parties had been bound severally as well as jointly. Code, ch. 144, § 13, p. 582. But at law he must be sued in a separate action, for he cannot be sued jointly with the survivor because the judgment against one is *de bonis testatoris* and the other *de bonis propriis*. 1 Chit. Pl. (Phil. ed. 1828,) p. 40, and authorities cited in note (i.) And so if the death occur after suit brought upon the joint contract, and before verdict, the suit abates as to the party so dying, though by our statute, it may proceed against the surviving defendant, and the plaintiff is put to a new action against the representative of the deceased party. See Code, ch. 174, § 1, 2, p. 656. It should seem therefore that several judgments were more appropriate than a joint one against Pendleton personally and against the other defendant as executrix of Richardson. Certainly it cannot be to the prejudice of the plaintiffs in error that judgments were rendered against

them upon their several confessions in the manner in which they were properly and legally chargeable; and if it were even an error in point of form to do so in a joint action, I should still think it not one for which those judgments should be reversed. In *White v. Tally*, 5 Call 98, the action was upon a joint bond against several. The writ was served upon the respective defendants at different times, but the pleas filed were the same, and separate judgments were rendered against the defendants during the same term. This was held not to be erroneous, and the judgments were affirmed.

I am of opinion to reverse the judgment of the 2d of May 1852, and to affirm those of the 16th of October 1851; and as the defendant in error must be regarded as the party substantially prevailing because he is thus restored to his judgments of the earlier date, I think he should recover his costs in this court.

The other judges concurred in the opinion of LEE, J.

The last judgment reversed, and the first judgment reinstated.

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1. The act of 5 George 2, ch. 7, § 4, subjecting lands, slaves, &c. in the colonies to payment of debts, was the law of Alexandria county in the District of Columbia from June 24th, 1812.
2. In favor of a judgment creditor of a deceased debtor, his real estate was not merely a secondary fund for the payment of the debt, but the real and personal estate were equally liable.
3. The judgment creditor might file a bill in equity against the executor and devisees to subject the real and personal estate to the payment of his debt.
4. The judgment creditor was not bound to pursue debtors of his debtor living out of the District of Columbia, before proceeding to subject the real estate.
5. A party to the suit claiming to have purchased a part of the real estate at a sale for taxes, and to have received a conveyance therefor; but such purchase having been made before the decree directing the real estate to be sold at the suit of the creditor, he cannot set up his purchase by a bill to review the decree on that ground.
6. A rule of practice prescribed by the Supreme court, which is in conflict with an act of congress, is void.

At the April term 1820 of the Circuit court of the District of Columbia for the county of Alexandria, George Suckley, surviving partner of Holey & Suckley, recovered a judgment against Richard Libby for the sum of eleven thousand and seventy-one dollars and thirty-two cents, with interest from the 19th of June 1819; upon which an execution was issued in the following November, and was returned "no property found." This judgment was upon a debt which had accrued since the year 1812. Libby made a payment on this judgment by the assignment of eighteen notes of R. L. Carne, so that the balance due on the 1st of

December 1820 was five thousand four hundred and four dollars and eighty-three cents.

In 1821 Libby died, having first made his will, by which he gave the whole of his estate to the children of his deceased sister Carne; and Lewis Hipkins, who had married one of these children, qualified as executor of the will.

In January 1824 Suckley filed his bill in the Circuit court of the District of Columbia for Alexandria, in which he set out his judgment against Libby, and the payment he had made upon it, the death of Libby, and his will. He alleged that Libby had died seized of some real and a small personal estate within the county of Alexandria; that the children of Mrs. Carne, to whom it was given by his will, were Mary the wife of Lewis Hipkins, Jane the wife of Bartholomew Rotchford, Susanna the wife of Nicholas Thornton, Richard L. Carne and William Carne; and making the children and the husbands of the females, and Hipkins as executor, parties defendants, he alleged that the personal estate was insolvent and inadequate to the payment of the testator's debts; and asked that he might have satisfaction of his judgment out of the real estate to the extent the personal estate should prove insufficient.

Hipkins and wife and Richard L. and William Carne answered the bill. They admitted the judgment and the will, and that the devisees and legatees were properly named. Hipkins stated a further payment that he had made upon the judgment; and they all insisted that the real estate was not liable, because they said there was a large personal estate belonging to the testator, consisting chiefly of sundry large debts due from persons in the states of Virginia and Kentucky, which, when collected, would be more than sufficient to discharge the balance due upon the judgment. And they refer to a debt due from John Field of Kentucky,

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and three debts due from Aaron Kee of Virginia, which were placed by Libby in the hands of the plaintiff, and were to be applied to this judgment, but for which the plaintiff had not given the credit, nor had he rendered any account to the defendants.

In 1826 an order was made on the motion of the plaintiff, directing a commissioner of the court to report to the court the account between the plaintiff and the executor of Libby, showing the balance due on the judgment. This report was returned in June 1826, and showed a balance due of four thousand nine hundred and sixty-nine dollars and thirty cents, with interest from the first of June 1825. In 1830 the court made another order, directing a commissioner to settle the account of Hipkins' administration on the estate of Libby. This report was returned in 1831, and shows a balance of four hundred and thirteen dollars and twenty-six cents due by the executor on the 1st of November 1830. This report did not allude in any manner to the debts of Field and Kee.

At the October term for 1839 the cause came on to be heard, and the decree recites that it was set for hearing as to Hipkins and wife, and the two Carnes, upon the bill, answers, &c.; that the bill had been regularly taken for confessed and set for hearing as to Rotchford and wife; and it appearing to the satisfaction of the court that the order of publication made at November term 1823 against Nicholas Thornton and Susanna his wife, had been duly executed, and they failing to appear, &c. the court doth order the bill to be taken for confessed and set for hearing as to said Nicholas Thornton and Susanna his wife. It then directs Hipkins to pay to the plaintiff the sum of four hundred and thirteen dollars and twenty-six cents, ascertained by the report of the commissioner to be in his hands as executor of Libby, with interest. And unless the defendants or some of them should by the

11th of May next pay to the plaintiff the balance of his judgment, after crediting the sum aforesaid with interest, a commissioner named was directed to sell the real estate of which Libby died seized, or so much as might be necessary to pay said balance, in the manner and upon the terms stated in the decree.

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A copy of this decree was served on Rotchford on the 1st of April 1840; and it was endorsed, to be final as to Rotchford and wife, unless cause be shown to the contrary on or before the first day of the next term.

"And at a court continued and held the day of May 1840, came the parties by their attorneys, and on the plaintiff's motion, the decree of the last term is made final."

In April 1841 Rotchford and wife, and Richard, Mildred, William and Mary Thornton filed a bill to enjoin the execution of the decree of October 1839, and to review it. They charge that Nicholas and Susanna Thornton died as early as 1827, but that the suit had not been abated as to them or revived against the complainants Richard, &c. who were the heirs of Susanna Thornton. That the bill of the plaintiff does not allege that execution had been issued upon his judgment in the lifetime of Libby. That the judgment had not been revived either against the executor or the heirs. And Rotchford alleges that the real estate of Libby, which remained to be sold by the commissioner, had been sold for taxes due to the city of Alexandria, and purchased by him, and had been regularly conveyed to him on the 24th of June 1839. And they set out the following errors, for which the decree should be reviewed and reversed:

1st. That the complainant had a complete and adequate remedy at law, and therefore the court as a court of equity, had no jurisdiction of the cause.

2d. That Nicholas Thornton and Susanna his wife

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3d. Because the said Richard, Mildred, William and Mary Thornton were not parties to the suit, and were not bound by the decree.

4th. Because said property had been before the rendition of said decree, legally sold and conveyed by the common council of Alexandria for a valuable consideration.

For these errors they prayed that the decree of 1840 might be reviewed and reversed; and in the mean time that the sale of the real estate of Libby might be enjoined. The injunction was granted as prayed.

Suckley answered the bill at great length, but it is unnecessary to state the grounds of defense taken in it. As to the sale of the property for the taxes, he insisted that the sale was void for irregularity; and that some of the devisees of Libby lived all the time in Alexandria, with ample means to pay the taxes, and that Rotchford himself during the whole time lived either within the city or within a mile of it, and was in independent circumstances.

In November 1844 the cause came on to be heard, when the court annulled and set aside the decree of 1840, except as to so much of the property as had been sold by the commissioner, for which conveyances were directed to be made to the purchasers. And leave was given to Suckley to amend his bill and make the children of Susanna Thornton parties defendants to this suit.

Suckley having died, his suit was revived in the name of his administrator, who in 1851 filed an amended bill making the heirs of Susanna Thornton parties defendants. Rotchford answered, and there was an order of publication as to the children of Susanna Thornton. And on the 10th of February 1852

the cause came on to be finally heard, when the court
perpetuated the injunction, without prejudice to any direct proceeding the plaintiff might institute for the purpose of vacating the conveyance from the common council to Rotchford of the property protected by the injunction. From this decree Suckley's administrator applied to this court for an appeal, which was allowed.

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Heath and Neale, for the appellant.

H. Winter Davis, for the appellees.

SAMUELS, J. The constitution of the United States, art. i, § 8, clause 16, declares, "The congress shall have power" "to exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding ten miles square,) as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States."

The state of Virginia, by the act of assembly passed December 3d, 1789, 13 Hen. St. p. 43-44, declared, "That a tract of country, not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof as congress may by law direct, shall be and the same is hereby forever ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction as well of soil as of persons, residing or to reside therein, pursuant to the tenor and effect of the eighth section of the first article of the constitution of the government of the United States.

"§ 2. Provided, that nothing herein contained shall be construed to vest in the United States any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States.

1855. "§ 3. And provided also, that the jurisdiction of
January Term. the laws of this commonwealth over the persons and
property of individuals residing within the limits of
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ford & als. the cession aforesaid, shall not cease or determine until
congress, having accepted the said cession, shall by
law provide for the government thereof, under their
jurisdiction, in manner provided by the article of the
constitution before recited."

The state of Maryland having by statute provided for a cession of territory to the federal government, the acts of congress passed July 16, 1790, 1 U. S. Stat. at Large, p. 130, and March 3d, 1791, 1 U. S. Stat. at Large, 214, and the executive action under those acts, fully completed the cession, and parts of Virginia and Maryland made to form the District of Columbia, the seat of the federal government.

In discharge of the duty to provide laws for the government of the district thus established, it was enacted by congress February 27th, 1801, 2 U. S. Stat. at Large, p. 103, ch. 15, § 1, "That the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said state to the United States, and by them accepted for the permanent seat of government."

In further discharge of the duty to provide laws, it was enacted by congress June 24, 1812, 2 U. S. Stat. at Large, p. 756, ch. 106, § 4, "that real estate in the county of Alexandria shall be subject to the payment of debts hereafter contracted in the same manner, to the same extent, and by the same process as real estate in the county of Washington is subject to the payment of debts by the laws now in force in the said county of Washington, the operation of which laws is hereby extended to real estate in the said county of Alexandria for the satisfaction of debts hereafter contracted." 2 U. S. Stat. at Large, p. 756, ch. 106, § 4.

The county of Alexandria, in this act mentioned, included that part of the district of Columbia which was ceded by the state of Virginia, and the county of Washington that part which was ceded by the state of Maryland. The law governing the county of Washington is the same as the law of Maryland: And thus the liability of real estate in Alexandria to be applied in satisfaction of debts is regulated and controlled by law the same as that of Maryland.

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It was conceded in the argument here, and is fully shown by numerous adjudged cases in the Court of appeals of Maryland, that the statute 5 George 2, ch. 7, § 4, was in force in that state February 27th, 1801, when their laws were extended by act of congress to Washington county; and was in force in Washington county June 24th, 1812, when the law of that county was extended to Alexandria county.

The statute 5 Geo. 2, ch. 7, § 4, provides, "That from and after the twenty-ninth day of September one thousand seven hundred and thirty-two, the houses, lands, negroes, and other hereditaments and real estates situate or being within any of the said plantations, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts."

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The act of the general assembly passed February 3d, 1846, Sess. Acts, p. 50, the act of congress passed July 16th, 1846, and the act of assembly passed March 13th, 1847, Sess. Acts, p. 41, taken together, produced the effect of bringing the county of Alexandria again within the jurisdiction of this state, and making the territory a part of the state. They had the further effect of securing to all persons all rights acquired under the laws theretofore in force in that county, and of preserving all actions there pending; and of requiring the courts of this state to respect all proceedings theretofore rightly had in such actions, and that all ulterior proceedings should be had according to the laws of Virginia.

The judgment was rendered in favor of Suckley, the surviving partner, against Libby in his lifetime, at April term 1820, for a debt contracted after June 24, 1812.

The act 5 Geo. 2, ch. 7, § 4, according to its literal reading, as well as by the rules for construction of remedial statutes, subjected Libby's whole real estate to sale for satisfaction of Suckley's debt, regarding it as a debt merely apart from its character as a judgment. The appellant's intestate, the judgment creditor, having established his debt against Libby in his lifetime, was not compelled to look to the real estate as merely a secondary fund for payment, but had the right to look upon the estate, real and personal, as equally liable. This right the creditor might exercise, unless some equitable reason should require him to proceed first against the personal estate. *Hanson v. Barnes' lessee*, 3 Gill & Johns. 359; *Gaither and Warfield v. Welch's estate*, Id. 259.

In the case before us the creditor filed a bill in chancery, alleging that the personal estate has been exhausted without paying his debt, and praying that the real estate might be subjected to the payment thereof. The executor and devisees being all parties,

the court directed an account of the personal estate in the hands of the executor, and in case of the real estate, held it liable for only so much of the debt as the personal estate would not pay. The devisees have nothing to complain of, seeing that the creditor was thrown first upon the personal fund for payment. In the argument here, and in the answers of the defendants to the original bill, it was earnestly insisted that the creditor should seek satisfaction out of certain personal assets, that is, a debt due from Kee of Virginia, and another from Field of Kentucky, to Libby's estate. The answer to this pretension is obvious; Libby's executor had no authority to enforce the collection of these debts. There is, moreover, nothing to show that these debtors were solvent. On the contrary, certain facts in the record tend to show they were not so: An account of the personal estate was taken in which neither of these debts is mentioned, and no exception is taken for the omission. Moreover, there is no reason why the creditor should be required to give up a fund subject to a primary liability for his debt, and pursue another fund subject to the same liability. If any thing could have been realized from these debts of Kee and Field, it was the duty as well as the interest of the legatees and devisees to have looked after them.

In my opinion the appellant's intestate was rightly in court praying the relief sought. His proceedings for maturing his case seem to have been had under the laws of Virginia in force February 27, 1801. I perceive no error therein, taking, as I do, the recitals in the decree as sufficiently showing that the case had been regularly proceeded in. If it should be conceded that a rule of the court did require the bill to be filed before the subpoena issued, still as the law directed otherwise, the law must prevail. Although the supreme court had authority to prescribe rules of

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1855. practice in the circuit courts, those rules must be subordinate to the law. Although congress might have January Term. repealed or altered the law, yet it could not delegate that authority to another body.

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& als. After the decree at October term 1839 (made final as is said by the decree of May term 1840) had been rendered, Rotchford and wife and the heirs of Mrs. Thornton united in a bill praying an injunction to the further execution of the decree, and for a review and reversal thereof.

Regarding the decree of October term 1839 and the order of May term 1840 as one, yet according to the practice in Virginia, it should be held interlocutory only, and therefore not such as could be reversed upon bill of review. See 2 Rob. Pract. 414; *Dunbar's ex'ors v. Woodcock's ex'or*, 10 Leigh 628.

But according to the practice at that time prevailing in the District of Columbia, the decree would be held so far final as to be the subject of review by a bill for that purpose. *Whiting v. The Bank of the U. S.* 13 Peters' R. 6; *Ray v. Law*, 3 Cranch's R. 179.

Whatever may be the character of the decree complained of in the bill of review, and conceding for the present, that it was such as might be reversed on a bill of review showing sufficient cause for reversal, it yet remains to consider the sufficiency of the causes alleged in this bill, and how far they are sustained by proof. We are met at once by the obvious fact that some of these causes are personal and peculiar to Rotchford alone, or to Rotchford and wife, and others of them to Mrs. Thornton's heirs. The only cause common to all the plaintiffs in the bill of review is the alleged want of jurisdiction to entertain the bill of complainant. In support of this objection, it is said that the judgment should have been revived at law against the devisees, and the land thus subjected to the satisfaction of complainant's judgment. In reply to this, it may

be said, that the creditor might have thus revived his judgment: and so, he might have revived it against the executor. But in either case, it would have been material to ascertain the amount due on the judgment, and possibly different results might have been arrived at in two several trials. In pursuing the fund in the hands of the executor it might have been necessary to convict him of a devastavit, by settling his account with the estate in his hands.

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This objection to the jurisdiction, when properly analyzed, will be found to rest upon the ground that the creditor should have tried the same fact, that is, the amount of his debt, in two several suits; one with the executor, the other with the devisees: or, that the creditor, to avoid two suits, might forego his claim on one or the other of the funds; that if he pursued the personal fund, he must encounter a second suit at law or in chancery, to subject the executor for a devastavit: that the devisees and legatees being the same persons, have the right to insist on having the creditor put to two suits; one against the executor, a trustee for the legatees; the other against the devisees directly: and all this for the purpose of obtaining payment of a debt, out of real and personal estate substantially belonging to the same persons as devisees or legatees.

The general principles of equity clearly justify the creditor in convening in one suit all parties interested in controverting the amount of his debt, and holding in their own hands or in the hands of their trustee the estate on which the debt is chargeable. The practice under the stat. 5 Geo. 2, ch. 7, § 4, is to convene all parties in interest, so that any party may defend his own interest without relying upon another for that purpose.

On the whole, I am of opinion the case was one peculiarly suitable for the cognizance of a court of equity.

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The objection that Thornton and wife were dead at the date of the decrees of October term 1839, and May term 1840, is not sustained by proof. Moreover they were proceeded against as absent defendants; and the statute prescribes a different mode in which they or their heirs shall make defense.

The fact alleged that Rotchford had become the purchaser of the real estate or a portion of it, at a sale for the payment of taxes due the corporation of Alexandria, cannot sustain the bill of review, because his purchase, even if valid, was made before the decree of October 1839, and should have been relied on as a defense against the relief prayed in the original bill.*

The causes for reversal alleged in the bill of review I regard as wholly insufficient for that purpose; and the Circuit court erred in permitting it to be filed. The subsequent proceedings in the cause having been had to some extent in consequence of the bill thus improperly filed, are necessarily also erroneous.

I am of opinion to reverse the decrees of the court below subsequent to that of May term 1840, in the manner and to the extent set forth in the decree of this court.

The other judges concurred in the opinion of SAMUEL, J.

The decree was as follows:

The court is of opinion that the said decree of the Circuit court rendered February 10th, 1852, is erroneous; that so much of the decree of November 28th, 1844, as annuls and sets aside the decree of May term 1840, which last mentioned decree makes final the decree of October term 1839; and so much thereof as gives leave to file an amended bill is also erroneous, such amended bill not being necessary in the position in which the case should be made to stand.

The court is further of opinion that there is no error in so much of the decree of November 28th, 1844, as approves and confirms the sales made under the decrees of October 1839 and May 1840. Therefore, it is decreed and ordered that such and so much of the several decrees herein before declared to be erroneous be reversed and annulled; and that such part of the decree of November 1844 as is declared to be free of error be affirmed; and that the appellees do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court, proceeding to pronounce such decree as the Circuit court should have pronounced, it is further decreed and ordered, that the decrees of October term 1839 and May term 1840 be reinstated in their original force and effect; that the injunction awarded upon the filing of the bill of review be dissolved, and the bill of review dismissed; that the amended bill filed by complainant at September rules 1845 be also dismissed as being unnecessary, and that the appellees do pay unto the appellant his costs in the Circuit court expended in defending himself against the bill of review and in filing his amended bill.

It is further ordered, that the bill of revivor (erroneously called a bill of review) filed July rules 1851, to revive in the name of Suckley's administrator, be dismissed, the suit having been so revived at June term 1851. And the cause is remanded, with directions to revive the suit, if revivor be necessary, and for further proceedings to enforce the rights of the appellant accrued under the laws heretofore governing the county of Alexandria, but according to the practice prescribed by the laws of this state now in force in that county.

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PENN v. WHITEHEADS.

(Absent LEE, J.)

February 5.

1. A husband carries on a mercantile business as agent for his wife, and he is aided by his sons, who are minors. The business is profitable, and property is accumulated from its profits. The husband has an interest in this property, which may be subjected by his creditors to the payment of his debts.
2. Upon a bill by the creditor of the husband, who had recovered a judgment upon which an execution had issued, and had been returned "no effects unencumbered," to subject the property, charging that the agency was a fraud, and that the property was the husband's; or that at least he had an interest in it on account of his services, and the services of his sons, who were minors, and asking for an injunction to restrain the collection of the debts and the disposition of the property, and for a receiver, the injunction was properly granted: And upon a motion in vacation to dissolve the injunction, which was overruled, it was proper to appoint a receiver to sell the property and collect the debts.
3. In this case, one of the sons of the husband having come of age, was taken in as a partner, and there were debts due for goods purchased, for which the son was liable. If these debts were entitled to be first paid out of the property, it was still error to direct the receiver to pay them, before having a report upon them by a commissioner of the court.

In January 1853 James S. Penn filed his bill in the Circuit court of Nelson county, in which he alleged that Floyd L. Whitehead was indebted to him in the sums of eight hundred and twelve dollars and fifty cents, and of one thousand nine hundred and eighty-four dollars and sixty-three cents, with interest from the 1st of January 1842, which he had recovered against the said Whitehead by a decree of the Circuit court of Nelson made in October 1842, upon which execution had been issued and returned "no effects

unencumbered." That Whitehead had conveyed away all his property except money to secure creditors to the exclusion of the plaintiff, and except certain property conveyed to one Charles Williams, in trust for Maria P. Whitehead his wife. That by a suit in the County court of Nelson, Whitehead contrived to have Williams removed and himself appointed trustee in his place. That Whitehead afterwards commenced the mercantile business in the county of Nelson, styling himself agent for Maria P. Whitehead, and was aided by his two sons, both of whom were minors, and owed their service to their father, and not to their step mother Mrs. Whitehead. That Whitehead was in fact doing business for himself. That Mrs. Whitehead furnished no money at the commencement or during the progress of the business to carry it on. That she had nothing except the property conveyed in trust as aforesaid for her benefit; and that she continued to hold.

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He further charged, that for the purpose of carrying on his fraud, Whitehead changed the style of his business, and pretended that his son Alexander, who was then a minor, and without money, was a partner; and the business was then conducted under the style of Floyd L. Whitehead, agent, & Son.

He further charged that Whitehead was then engaged in the mercantile business with Joseph B. Coffey. That Whitehead, agent, & Son had recently ceased to sell goods, and the stock which was on hand had been sent to the establishment of Whitehead & Coffey; and the father and son were then engaged in settling up the business of the other two concerns. He charged that the books and papers of the three concerns were the property of Floyd L. Whitehead; and that a tract of land which he had acquired, and a negro man and three horses he had purchased were his property; and not the property of his wife.

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The plaintiff further charged that if Whitehead was in fact acting as agent of his wife, his services and the services of his two sons were worth at least the sum of three thousand dollars, which a court of equity would charge upon the trust property in favor of creditors. And making Whitehead and his wife and his son Alexander defendants to the suit, he asked for an account of the profits of the mercantile concern, and of the capital invested therein by Floyd L. Whitehead; and if necessary, an account of the value of the services of said Whitehead, and of his sons, whilst they were under the age of twenty-one years; and also for an injunction to restrain the defendants from selling the property, and collecting or otherwise disposing of the debts until they should give security in the penalty of three thousand dollars, with condition to have that amount arising from the collection of the debts, forthcoming to answer the future order of the court; and if they should fail to give the security in a limited time, that a commissioner might be appointed to collect said debts. The injunction was granted according to the prayer of the bill.

The defendants answered separately. They all denied the fraudulent intent imputed to them. They denied that Floyd L. Whitehead had any personal interest in either of the mercantile concerns. They admitted that no capital was put in by either Mrs. Whitehead or by Alexander Whitehead. Whitehead and Mrs. Whitehead stated that the place where the business was conducted, and the first goods purchased, were rented and purchased of H. W. Heath & Co. who had conducted a store at the place; and were made upon the faith of Mrs. Whitehead's trust property. That the subsequent purchases were in like manner made upon her credit, and all persons were informed of the character in which Floyd L. Whitehead acted. As to the services of the sons, the younger was going

to school the greater part of the time, and Alexander was supported by Mrs. Whitehead. And as to Floyd L. Whitehead, the books would show that he had drawn out of the concern full as much as his services were worth. Alexander Whitehead stated that for the two years he was a partner, he was to receive one-fourth of the profits. That the debts of Whitehead, agent, & Son, for which he was responsible, amounted to eight thousand two hundred dollars, debts which had been contracted for goods; and he insisted that he should not be deprived of the assets of the concern, and left subject to this liability.

A mass of testimony was taken in the cause, which it is unnecessary to notice further. It is sufficiently stated in the opinion of the court.

The defendants gave the plaintiff notice that they should, on the 3rd of February 1853, at the office of the judge, in vacation, move him to dissolve the injunction: And accordingly, the cause came on, on that motion, when the court held that the whole net profits of the concern of Whitehead, agent, and three-fourths of the profits of Whitehead, agent, & Son, and of Whitehead & Coffey, whether existing in the form of money or property, real or personal, or choses in action, being the fruits of the labor and skill of Floyd L. Whitehead and his minor sons, and not in fact the profits or product of the trust estate of his wife, were not protected from the payment of his debts by the arrangement resorted to, to give them the semblance of profits realized from the separate estate of the wife upon a *bona fide* separate trading of the wife, in pursuance of a lawful and binding contract, or permission or consent of the husband, either before or since the *coverture*. And that the nominal contracts by Whitehead, agent, &c. and Whitehead, agent, & Son, carrying on concerns in these names and styles, however free from *mala fides* or actual fraud they may have been, in

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consequence of having resulted from the mistaken opinion or advice of counsel, or the mistaken opinion of the client as to the rights of his wife or his own rights, duties and responsibilities, were, in legal contemplation, fraudulent devices or contrivances for the purpose of defeating the creditors of the husband, and securing to him and his family the profits of his skill, labor, resources and contracts against their demands: And he therefore overruled the motion to dissolve the injunction.

The judge then went on to decree, that unless the defendants, or one of them, or some one for them, executed the bond required by the order granting the injunction, within ten days, that Robert Whitehead be appointed a commissioner and receiver of the court, to take into his possession the books, papers and evidences of debt of the said concerns, and the property, real, personal and mixed, appertaining thereto; to collect the debts, and make sale of the property on the usual terms; and pay out of such debts, collections and sales of property, all the liabilities of said concerns to merchants or others who have trusted them for supplies of goods, moneys or other things; and that he hold the residue or profits of said concerns subject to the future order of the court; and that he make report to the court of his proceedings under this decree. And the court would thereafter direct the account prayed for, to ascertain the net profits of the concerns; and the value of the services of said Whitehead and his minor sons; and upon the final hearing would determine as if upon a review or reconsideration of the decree, whether the plaintiff was entitled to subject the whole of the profits of the first concern and three-fourths of the second, or only such part as would be equivalent to the services of the said Floyd L. Whitehead and his minor sons. From this decree Penn obtained an appeal to this court.

Patton, for the appellant.

Morson and Robinson, for the appellees.

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MONCURE, J. delivered the opinion of the court.

The order appealed from in this case was made on a motion founded on the provision in the Code, ch. 179, § 12, p. 678, which declares that "the judge of a Circuit court in which a case is pending, wherein an injunction is awarded, may, in vacation, dissolve such injunction, after reasonable notice to the adverse party." In deciding on this motion, it was only necessary for the judge to determine whether or not (looking to the case as it then stood) it appeared that the appellee Floyd L. Whitehead had any interest in the subject in controversy, which could be made liable to the claims of his creditors, and that the appellant was a creditor entitled to enforce such liability. If it did so appear, it was proper to continue the injunction; otherwise it was proper to dissolve it. It was unnecessary and premature in that stage of the case to enquire, or express any opinion, as to the precise extent of the interest which could be so made liable; whether it embraced the whole subject in controversy, or the surplus thereof, after paying the debts of the mercantile concerns mentioned in the order, or either of them, or an undivided portion of such surplus.

We are of opinion that the said appellee had such an interest in the subject in controversy. He carried on the trade as agent of his wife and on her separate account. She pledged her separate estate (so far as she had power to do so) for the stock of goods with which the trade was commenced; and the store-house was leased to her husband as her agent. The subsequent purchases, or many of them, were made on the credit of her separate estate, or of her husband as her agent. But she invested no money in the business, and always remained in the possession and enjoyment

1855. of her separate estate. It is comparatively of small
January Term. value, and consists of unproductive personal property,
much of which is perishable. She has but a life estate

Penn in the property, with a power of appointment "by
v. will to such person or persons as she shall chose, but
Whiteheads. not out of her own family, or the family of her said
husband." And it is provided in the deed of settle-
ment that even during her life the property shall
remain in her possession for the support and main-
tenance of herself and her issue and family, and for
no other purpose whatever. She could certainly
pledge or charge no more than her life estate in the
property if even she could do that: which is at least
very questionable. At all events, it is obvious that
whatever was acquired by the trade was acquired, in
whole or in part, by the labor and skill of the husband.
Creditors trust their debtor on the faith, not only of
his present property, but of his future acquisitions,
whether made by his labor and skill or otherwise: and
he has no right to devote either to the separate use of
his wife, in exclusion of their claims. He is certainly
under a high obligation to support his family; but he
is under a still higher obligation to pay his debts. If
the wife in this case had no power to pledge or charge
her separate estate, then the arrangement under which
the trade was carried on by her husband as her agent
was purely voluntary; and though it might be valid
as between the husband and wife, it would seem to
be void as to his creditors. Whether in that case the
creditors, whose debts were created on the faith of the
arrangement, would be entitled to priority of payment
out of the subject in controversy, is a question which
it is unnecessary now to consider. If she had such
power, then the arrangement would be void as to his
creditors to some extent, and whether in whole or in
part, would be a question for the court to decide at
the hearing. It valid as to them to any extent, it

would only be to the extent of compensating her just interests in the subject; on the principle of the cases of *Quarles v. Lacy*, 4 Munf. 251; *Blanton v. Taylor*, Gilm. 209; and *Taylor v. Moore*, 2 Rand. 563. It would be difficult, if not impossible, for the court to adjust the relative and conflicting interests of the wife and the creditors of the husband in the profits of the trade; and to ascertain how much she should receive for the credit of her separate estate, and they for the labor and skill of himself and his infant sons in carrying on the business. She might at least be entitled to require that the property acquired by the trade should be applied to the payment of the debts of the concern, before it was subjected to the claims of his individual creditors. She would certainly not be entitled, as against them, to all the profits of the business, however large they might be, on the ground that the services of the husband and his infant sons in carrying it on had been adequately compensated by the support which they derived from it. A man may be so successful in business as to make more than a support for his family, and more than the ordinary value of such services as were rendered by him in carrying it on; and his creditors are entitled to the benefit of all that he can make. He cannot, by trading as agent of his wife and on the credit of her separate estate, secure to her separate use, in exclusion of the claims of his creditors, all the proceeds of his future labor and skill beyond the necessary support of his family. The business in this case appears to have been very successful, and to have yielded a profit beyond the support of the family, including the wife. We deem it unnecessary to express any opinion as to any right or interest of the appellee Alexander R. Whitehead in the subject in controversy; and think enough has been said to show that the appellee Floyd L. Whitehead has

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Penn v. Whiteheads. We are also of opinion that the appellant is a creditor entitled to enforce such liability. He is a decree creditor, and avers in his bill that he has sued out two executions on his decree, which have been returned "no effects unencumbered." He exhibits a copy of his decree, though not of the executions and returns. But the averment in the bill in regard to the executions is not denied in any of the answers; and, on a motion to dissolve, must be taken to be true. Having thus acquired a right to have satisfaction out of his debtor's property specifically, he is therefore entitled to come into equity to impeach the arrangement in question, on the ground of fraud. Whether a creditor at large would be so entitled, under the provision in the Code, ch. 179, § 2, p. 677, is a question which need not be considered. It is stated in the answer of Floyd L. Whitehead, that the appellant has long since conveyed away his claim by deed of trust for the benefit of his creditors; a copy of which deed is in the record: and it is contended that the appellant has therefore no right to maintain this suit. It is not pretended that the claim was ever sold under the deed of trust; and, even if the deed be still unsatisfied, we are of opinion that the appellant has a sufficient interest in the claim to entitle him to maintain the suit; though it may be necessary hereafter to make the trustee in the deed a party to the suit.

The motion to dissolve the injunction was therefore properly overruled.

We are also of opinion that there is no error in so much of the order as appointed a receiver to take into possession all the papers, books, accounts, evidences of debt, &c. of the concerns therein mentioned, and the property, real, personal or mixed, appertaining thereto, collect the debts, make sale of the property upon the

usual terms, and make report to the court. The power to appoint a receiver, when one is necessary for the collection, preservation or sale of property pending an injunction suit, is incident to the power to grant an injunction; and the latter power being expressly conferred by law on a judge in vacation, the former is conferred on him by implication. The necessity for the appointment of a receiver in this case for the purposes before mentioned, is shown by the answers of the appellees; from which it appears that when arrested by the injunction they were engaged in winding up their business, by selling their property, collecting their credits, and paying their debts, and their interests required that the sales and collections should be made with as little delay as possible. Indeed, the counsel of the appellees, in their argument of this case, did not question, but seemed to admit, the propriety of appointing a receiver, if it was proper to continue the injunction.

But we are of opinion that there is error in so much of the order as directed the receiver to "pay out of such debts, collections and sales of property, all the liabilities of said concerns to merchants or others who have trusted them for supplies of goods, moneys or other things." It was premature to determine, before the hearing of the cause, whether the creditors of the said concerns, or either of them, are entitled to priority of payment out of the subject in controversy; and if they are so entitled, it was erroneous to direct the receiver to pay their claims before they were ascertained and allowed by the court. Before any such direction is given, an order should be made directing a commissioner of the court to take an account of what is due to the said creditors, and to cause them, upon due public notice, to come before him and prove their claims; so that an opportunity may be afforded to the appellant and the creditors respectively, to contest any

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1855. of the said claims before the commissioner, or before
January Term. the court, on exceptions to his report.

Therefore, so much of the said order as is in conflict with the foregoing opinion is reversed, with costs to the appellant, and the residue thereof is affirmed. And the cause is remanded to the Circuit court for further proceedings to be had therein.

DECREE REVERSED.

Richmond.**HUTCHESON, *sheriff, adm'r &c. v. PRIDDY.***1855.
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February 12.

1. If the County court commits an estate to the sheriff for administration, before the expiration of three months from the death of the testator or intestate, the act is not void but voidable.
2. In such a case the County court, having general jurisdiction to grant administration, the act of the court in committing the estate to the sheriff cannot be questioned in any collateral proceeding.
3. An estate having been committed to the sheriff, the County court cannot grant the administration to a distributee, without notice to the sheriff of the application.
4. It is not imperative on the County court to grant administration to a distributee after the estate has been committed to the sheriff; but there is a legal discretion in the court.

This is a controversy concerning the right to administer upon the estate of a decedent.

At the October term in the year 1853 of the County court of Henrico, a paper writing purporting to be the last will and testament of James O'Brien deceased, and bearing date on the 16th of June 1846, was duly proved and ordered to be recorded as the true last will and testament of the deceased. And thereupon the appellee Elijah Priddy, the executor named in the will, appeared in court and refused to take upon himself the burden of the execution thereof.

On the 8th of November following, in the same court, on the motion of Caleb C. Mitchell and wife, (the latter being devisee of one-sixth of the whole estate of the testator,) it was ordered that the estate of the said James O'Brien deceased be committed to the appellant, who was sheriff of the county of Henrico, for administration with the will annexed, according to law.

1855. On the 7th of December 1853, the appellee Priddy
January Term. appeared and moved the court to permit him to qualify
Hutche- as executor of the said James O'Brien deceased, ac-
son, cording to the terms of the will. This motion was
sheriff, overruled, and Priddy excepted. He then moved the
adm'r &c. court to revoke the order committing the estate to the
v. sheriff of Henrico for administration, and to allow him
Priddy. to qualify as administrator; and he exhibited the will
of the decedent, showing that his wife, who was a
daughter of the decedent, was made a devisee of one
full sixth part of the whole estate. He also proved
by witnesses that the death of the testator occurred on
the 17th or 18th of August 1853: and that four of the
legatees named in the will desired that he should be
permitted to qualify as executor. On the other hand
Mitchell, who contested the motion, proved that Priddy
had a claim against the estate the justice of which was
contested, and which had not been allowed by the
administrator. The court overruled the motion, and
Priddy excepted. He then applied to the Circuit
court of Henrico for a *supersedeas* to this order over-
ruling his motion to be permitted to qualify as admin-
istrator, and it was allowed. And upon the hearing
in the Circuit court, that court reversed the order of
the County court, and remanded the cause with in-
structions to set aside the order committing the estate
to Hutcheson, sheriff of Henrico, for administration,
and to permit Priddy to qualify as administrator *de
bonis non* with the will annexed. And to this judgment
of the Circuit court Hutcheson applied for and ob-
tained a *supersedeas* from this court.

August and Randolph, for the appellant.
Crump and Davis, for the appellee.

LEE, J. The relation in which a sheriff to whom
the estate of a decedent is committed for administra-

tion, stands to the estate has been materially changed in the course of the legislation upon this subject. Under former laws the estate was in effect administered by the court, and the sheriff was but the officer of the court charged with the execution of its orders made in the progress of the administration. See Acts of 1705, ch. 10, § 10, 11; Acts of 1748, ch. 3, § 2; 1785, ch. 61, § 55. At the revisal of 1819, a general provision was introduced, by which the sheriff in such case, without giving any other bond or taking any other oath than those already given and taken, is declared to be the administrator, (with the will annexed if there be a will,) and entitled to all the rights and bound to perform all the duties of such administrator. 1 Rev. Code 1819, ch. 104, § 67. And the same provision is retained in the present Code, ch. 130, § 10. He thus stands on the footing of any other administrator, subject only to the power reserved to the court to revoke the order committing the estate to him, and allow some other person to qualify as executor or administrator. While his powers continue he may collect the assets, discharge the debtors of the estate, and pay off all claims against it: he may sue and be sued as such administrator; like any other is bound to render an account of his administration, and is entitled to the same allowances for his expenses and services. In short, every right and every duty pertaining to any other administrator is thus devolved upon him; and upon general principles and by all analogy, it should seem that before his office can be taken away from him and given to another, he should have notice of the intended application for that purpose, in order that he may make any proper defense, and may also conform his own arrangements with reference to the expected termination of his powers. For as a part of his duty to defend the estate committed to him, he may and should resist the efforts of

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1855. any unfit and unsuitable person to get possession of it,
January Term. by causing his powers to be revoked and obtaining
Hutches- administration for himself. He is concerned to see
son, that adequate security be given by his successor, and
sheriff, he is better prepared than any other to inform the
adm'r &c. court as to the amount that should be required: and
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Priddy. he should know when his powers terminate and those
of that successor come to replace them. If he have
no notice of the intended action of the court, he may
proceed in utter ignorance of what it may have done,
to make arrangements with creditors and others, which,
being utterly void because his powers had been re-
voked, may compromise both him and them, and occa-
sion serious loss and inconvenience to innocent parties.

It is urged that the act of assembly which reserves to the court the power to revoke the administration committed to the sheriff, and to grant it to some other person, contains no provision for a citation or notice to the sheriff when an application is to be made to the court to exercise that power; and that no such citation or notice is necessary, because the sheriff has no rights or interest in the subject, and cannot resist the revocation of his powers and the grant of administration to another person, which the court itself has no discretion to refuse.

It is true there is no provision for any citation or summons before the court shall act. Nor is there any in the case under the fifth section, where administration has been granted to a creditor or some other person, or a will has been admitted to record after a previous grant of administration, and a distributee who shall not have before refused shall apply for administration; and yet in these cases it can scarcely be supposed that a court would be justified in displacing an administrator regularly appointed without his having been first cited or in some way notified to appear and defend his interest. So in a case in which

a surety seeks to be relieved of his suretyship, he must give the administrator due notice of his intended application to the court, without proof of which the court will not make the preliminary order requiring the administrator to give a new bond. And there can be no reason why a proper notice should not be given in the case of a sheriff administrator. He has, as we have seen, rights and an interest in the subject the same as any other administrator. It is not a matter of course that the court will revoke the grant to the sheriff and allow any other person to qualify as administrator. The words in the act of 1819 are, "The court, however, shall have power, at any time afterwards, to revoke such order" (committing the estate to the sheriff,) "and to grant letters testamentary or letters of administration to any person entitled thereto." Those of the present act (Code, p. 542, § 10,) are, "The court may, however, at any time afterwards, revoke such order and allow any other person to qualify as executor or administrator." But these terms "any other person" must necessarily have some limitation, and this is to be found only in the sound discretion of the court, to which must be referred the fitness or suitableness of the party applying, and the time and circumstances of his application; and touching these, the acting administrator should have an opportunity to be heard.

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Nor is the case altered by the fact supposed to be proved in this cause, that the order committing the estate to the sheriff, was made some few days before the expiration of three months from the death of the testator. If the order made thus prematurely were *ipso facto* void, it might be otherwise. I think however that it is voidable only and not void. The fourth section of the act in effect reserves the right of administration to distributees exclusively for thirty days after the death of the decedent; yet if the court should

1855. chance to grant administration to a creditor or some other person before the expiration of the thirty days, it will scarcely be seriously contended that such a grant would be absolutely void; though it certainly would be erroneous and voidable. Whether in either case, the order for administration was made at a proper time or prematurely, is not such a question of jurisdiction as may be raised collaterally in another action or proceeding. The jurisdiction of a County court upon this subject is a general jurisdiction conferred by statute to grant probat of wills, and to hear and determine suits and controversies testamentary and concerning administrations. Code, ch. 122, § 23, p. 519; ch. 130, § 4, p. 541. It is a court of record, and its judgments or sentences cannot be questioned collaterally, if it have jurisdiction of cases *eiusdem generis*. Where it has jurisdiction over that class of cases, whether the court erred or not in determining that the facts were proved upon which the power to grant administration in the particular case depended, is not to be enquired into collaterally. It must be supposed to have enquired into and decided upon those facts at the time of making its order, and its decision if erroneous, would be voidable only and not void. Accordingly under the influence of these considerations, it has been held in this court that a grant of administration by the court of a county not authorized by the facts of the case to make such grant, (the decedent having had no residence, and having left no estate of any kind in the county by the court of which the grant was made,) was not void but voidable only; overruling previous decisions of the General court to the contrary in *Barker's Case*, 2 Leigh 719; and *Case of Robinson's Estate*, November term 1828, cited in *Barker's Case*. *Fisher v. Bassett*, 9 Leigh, 119; *Burnley's Reps. v. Duke*, 2 Rob. R. 102. See also *Schultz v. Schultz*, 10 Gratt. 358, 377; *Cox v. Thomas*, 9 Gratt. 312.

This case is plainly within the principles of the cases just cited. For if a grant of administration by a County court which had no jurisdiction or authority to make such grant upon the facts of the particular case, is yet voidable only because the court had a general jurisdiction in cases *eiusdem generis*, so the commitment of an estate to the sheriff for administration by a court which not only had jurisdiction in cases of that class, but also had full jurisdiction in the particular case to grant administration to some suitable person, would be but voidable and not *ipso facto* void even if the court had erred upon the facts in making the order at the time it was passed. And great inconvenience and embarrassment would be occasioned by a contrary doctrine. The acts of the sheriff would be of course invalid. He would incur all the liabilities of an executor *de son tort*, and innocent persons dealing with him upon faith of the authority conferred by a court of record, and possessing a general jurisdiction over similar cases, and authority to designate an administrator in the very case, might be subjected to great embarrassment and serious loss. While on the other hand no injury can result from treating the authority of the sheriff administrator as voidable only. His acts would be good until it be revoked; there would be a representative of the estate during the whole period; purchasers of the property belonging to the estate would be protected; the debtors to it might safely pay what they owed, and creditors and distributees would have all the security for the proper disposition of the proceeds which the official bond of the sheriff would afford.

Regarding, then, the authority of a sheriff administrator is voidable only and not void, even though prematurely conferred by the court in point of fact, he should have notice of the intended application to revoke it, just as in the case of an appointment of a

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1855. creditor as administrator before the expiration of the thirty days within which the right to administer is reserved to distributees exclusively. In either case, if the previous order of administration be assailed upon the allegation that it was prematurely made, the party should have the opportunity to contest the fact.

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Priddy. — I think therefore the County court did not err in overruling the motion of the appellee, as it does not appear that any citation or summons had been issued or served upon the sheriff, nor that he was present in court when the motion was made, nor that he has in any manner waived the benefit of such citation: and in this view it is rendered unnecessary to decide any of the other questions raised in the argument of the cause. I think, however, out of abundant caution it would be proper to amend the judgment by declaring it to be without prejudice to any future motion which the appellee may be advised to make to the same effect upon a proper citation or summons.

I am of opinion therefore to reverse the judgment of the Circuit court, to amend that of the County court in the manner before stated, and as amended, the same to affirm.

MONCURE, J. I think it is at least very doubtful whether the order of the County court of Henrico, committing the estate of James O'Brien to the sheriff for administration, was not a void order, less than three months having elapsed between the death of the testator and the date of the order. When it was made, neither the County court of Henrico, nor any other court of probat, had any power to make such an order; any more than if O'Brien had been then alive. In this respect the case differs from that of *Fisher v. Bassett*, 9 Leigh 119. There, when the grant of administration on Robinson's estate was made to Scott, some court had power to make the grant; and the

Court of hustings of the city of Richmond having taken cognizance of the subject and made the grant, the order of that court was considered by this to be voidable only, and valid until revoked or reversed. This case seems to be like that of *Wales v. Willard*, 2 Mass. R. 120. An act of that state provides that administration shall not be originally granted upon the estate of any deceased person after the expiration of twenty years from his death. The administration in that case was originally granted after the intestate had been dead twenty years. Parsons, C. J. in delivering the opinion of the court, said, "This administration, it was not competent for any judge of probate to grant; but it is a case in which it is expressly provided by the statute from which he derives his authority, that no administration shall be granted. It is not therefore the erroneous exercise of his judgment, but it is an assumption of power against law; and the grant is, *ipso facto*, a nullity."

But whether this be so or not, I am of opinion that Priddy was entitled to the administration when he applied for it, and that there was no necessity for any notice of the application to the sheriff; but that the order committing the estate to the latter would, by a grant of administration to the former, have been *ipso facto* revoked. In England, the person entitled to distribution is entitled to the administration; and though the ordinary may appoint another person administrator, yet he can only do so after the person entitled to the administration has refused it. That person must be cited to accept or refuse before there can be any valid grant to another. And *non vocatis jure vocandis*, is a sufficient ground for revoking a grant to another. In Virginia, the distributee, if a fit person, is also entitled to the administration. But there is this difference between the law of England and the law of Virginia; that by the latter, if no distributee apply

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1855. for administration within thirty days from the death of the intestate, the court may grant administration to one or more of his creditors, or to any other person, without first citing the distributees to accept or refuse. *Hutchinson v. Sheriff, admr &c.* Code, ch. 130, § 4, p. 541. The right of the distributees, however, is not lost by such grant to another, but is carefully preserved to them by law; which provides, that "if a will of a decedent be afterwards admitted to record, or if after administration is granted to a creditor, or other person than a distributee, any distributee who shall not have before refused shall apply for administration, there may be a grant of probat or administration in like manner as if the former grant had not been made; and the said former grant shall thereupon cease." Id. § 5. This law, it will be observed, requires no notice or citation to be given to the original administrator; and it is obvious, I think, that none was contemplated. The words, "and the said former grant shall thereupon cease," indicate that the new grant is, *ipso facto*, a revocation of the old. The original administrator is like a curator; or an administrator *durante minori actuab.*, or *durante absentia*; and his powers terminate on the qualification of the rightful administrator. Surely, if a will be afterwards admitted to record, and the executor obtain probat, there is no necessity for citing the original administrator, or expressly revoking his grant of administration. This was decided in the case of *Hunt v. Wilkinson*, 2 Call 49. The same principle applies to a subsequent grant of administration to the party entitled thereto. The same clause which provides for the case of a subsequent recordation and probat of a will, provides for the case of a subsequent grant of administration. In each case it is declared that the former grant shall thereupon cease; and the clause must have the same construction in regard to each.

I do not think there is any substantial difference

between the old law under which *Hunt v. Wilkinson* was decided, and the new. It is true the old law uses the word "shall," and the new law the word "may;" seeming, at first view, to indicate, that while under the old the duty of the court to grant administration to the distributee was imperative, under the new it was merely discretionary. But I think no change was designed by the legislature, and that the word "may," in the new law, has the same meaning with the word "shall," in the old. Certainly, the court under the new law has no right to refuse probat to the executor, being a fit person, if a will be recorded; and it can have no more right to refuse administration to a distributee, being a fit person; the same clause of the law providing for each case. The effective words in the old law, that there shall be a grant of administration to the distributee, "in like manner as if the former had not been obtained," are substantially repeated in the new. And there are in the new these additional words, not contained in the old, "and the said former grant shall thereupon cease;" which makes the meaning of the legislature still more plain.

It is provided by § 10, p. 542, that when an estate is committed to the sheriff for administration, "the court may, at any time afterwards, revoke such an order, and allow any other person to qualify as executor or administrator." If the grant of administration to a distributee under § 5, is, *ipso facto*, a revocation of the original grant to another person under § 4, *a fortiori*, such grant to a distributee is, *ipso facto*, a revocation of an order committing the decedent's estate to the sheriff. Formerly, the sheriff, to whom an estate of a decedent was committed, was not a full administrator, but little more than a *curator ad colligendum bona defuncti*. He was the mere officer of the court, and administered the estate under its order, and on equitable principles. He has since been declared by

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1855. law to be an administrator. But he does not now stand on precisely the same footing with a person appointed administrator under § 4; and may be displaced by the subsequent appointment, not only of a distributee, but of any other person. If there be no good reason for requiring any other administrator to be cited before his grant of administration is revoked, there is certainly less for requiring the sheriff to be cited; he being the officer of the court, presumed to be always in attendance upon it, and to have notice of its proceedings. It is true, the administration of the sheriff continues after his term of office expires; but it rarely happens that administration is granted to another after that period. In this case the application was made at the term of the court next succeeding that at which the estate was committed to the sheriff, and during the latter's term of office; and there can be no doubt but that he had actual notice of the application. I believe it has been the general, if not the invariable, practice of the courts of probat to grant administration in such cases without notice to the sheriff.

It is the duty of the court of probat to take care that a party to whom administration is granted is entitled thereto; and it may, if it see fit, cause the original administrator, or a sheriff committee, or any of the next of kin, to be cited to show cause against it. But it is under no imperative obligation to do so. Any person interested may voluntarily appear and resist the application of a distributee for administration; and will thus become a party to the proceeding and entitled to appeal from the sentence, or obtain a *supersedeas* thereto. The sheriff in this case might have appeared and become a party; and so might Mitchell and wife. The former did not so appear; no doubt because he did not care for the administration. The latter did appear and become a party; and the application was therefore refused.

The contest in the County court being between Priddy and Mitchell and wife, and not Priddy and the sheriff, I think that Mitchell and wife, and not the sheriff, should have been made parties to the writ of *supersedeas*; and that the sheriff had a right to have the writ quashed. But he made no motion for that purpose. On the contrary, the case was tried upon its merits in the Circuit court, and was decided in favor of Priddy. And now the sheriff seeks in this court to reverse the judgment of the Circuit court. I think that Priddy is entitled to the administration, being the only distributee who applied, and it not appearing that he is unfit for the office; on the contrary, it appearing that he had the confidence of the testator, in being appointed his executor and otherwise, and was the choice of a majority of the parties in interest. I also think that while the sheriff was an improper party to the writ of *supersedeas*, his proper remedy was by motion to quash it; and that if there be any error against him of which he has any cause of complaint, or actually does complain, it is only as to costs; which are not sufficient to give this court jurisdiction.

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I am therefore for affirming the sentence of the Circuit court.

The other judges concurred in the opinion of LEE, J.

JUDGMENT REVERSED.

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1. An order of reference is made in a pending action of ejectment by the terms of which all matters in difference between the parties are submitted to the final determination of the arbitrators chosen. But this order is made in pursuance of an agreement in writing under seal, between the same parties, to refer the single question of the value of the land in controversy; the defendant agreeing to give to the plaintiffs for the land the price fixed upon it by the arbitrators. The order of reference is to be construed with reference to the agreement, and therefore the award, which only fixes the value of the land, is in conformity to the submission.
2. A court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract.
3. Nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land.
4. The wife being one of three equal joint owners of the land, and they and the husband having united in the sale, though the husband and wife will not be compelled to execute the contract on their part, the other two joint owners will be compelled to convey their undivided interests, upon the payment by the vendee of their shares of the purchase money.
5. The case distinguished from *Bailey v. James*, 11 Gratt. 468.
6. A decree that a married woman shall convey land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty would not bind her. Code, ch. 121, § 7, p. 514.

In February 1850 an action of ejectment was instituted in the Circuit court of Henrico by Caroline V. Clarke, Emily W. Harris, David M. Branch and Sarah E. his wife, against Richard Reins, for the recovery of eight half acre lots of land in the town of Sydney, near Richmond. The plaintiffs claimed the lots of

land as heirs at law of Benjamin James Harris deceased. The female plaintiffs were his children. The issue was regularly made up at the May term following.

In December 1850 the plaintiffs and defendant entered into an agreement under seal, in which is recited the pendency of the action of ejectment, and that the parties to the agreement are desirous finally to settle and terminate said suit; and then proceeds: Now, therefore, it is herein agreed that the said parties shall forever end and conclude the controversy in said suit mentioned, in manner and form following, to-wit: That the matters in controversy shall be and are hereby referred and submitted to the final award and determination of Robert Edmond and B. W. Haxall, agreed to and chosen by the said parties as their arbitrators, so as the said arbitrators do make their award and determination of and concerning the said controversy for the following end and purpose, to-wit: that is to say, that the said arbitrators, after satisfying themselves of the value of said lots above mentioned and numbered, shall affix to and declare in writing, under their hands and seals, the real and actual value of the same, as they in the exercise of their judgments shall think right and proper. And then an umpire was provided for, if they differed in opinion.

And it was further agreed that the plaintiffs should, upon the return of said award, make a full and complete conveyance to the defendant of the said eight lots, and that they should receive from the defendant and he should pay to them the value of the said lots, as it should be ascertained and declared in the manner before mentioned. And it was further agreed that this agreement should be made a rule of court in the ejectment cause; and that the said court should be authorized to enforce its performance as if the same were a judgment obtained in said court.

In January 1851 an order was made in the cause,

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by which the parties mutually submitted all matters in difference between them to the final determination of Robert Edmond and Bolling W. Haxall, and agreed that their award, or the award of such persons as they should choose for an umpire, thereupon, was to be the judgment of the court; and the same was ordered accordingly.

In February 1851 the arbitrators made up and returned their award under their hands and seals. After referring to the agreement between the parties, and making it a part of their award; and reciting that under the authority of that agreement they had satisfied themselves of the value of the lots mentioned therein, they proceeded to award between the parties, that the said lots were in the judgment of the said arbitrators worth the sum of fifty dollars per lot; and that this sum of fifty dollars per lot was their valuation of the same.

Upon the return of the award the defendant moved the court to enter it as the judgment of the court, which motion was opposed by the plaintiffs, on several grounds of objection taken to the award. The court, however, overruled the objections, and ordered that the award be confirmed, and stand as the judgment of the court.

Reins then instituted a suit in the Circuit court of the city of Richmond, against the parties to the action of ejectment and agreement, setting out the facts, and asking that the said parties might be compelled to make to him the deed mentioned in the agreement; and that he might be quieted in his possession of said lots.

The defendants answered, stating their objections to the award; which were, that it was made without notice to them, and upon the *ex parte* statements of the plaintiff; though of these facts there was no evidence. They insisted further, that the value fixed

upon the lots was wholly inadequate, being in fact about one-third of their value: And they insisted that it was not a case in which, under the circumstances, a court of equity would enforce a specific execution of the contract.

The cause came on to be heard in January 1853, when the court decreed that the plaintiff should pay to the defendants the sum of four hundred dollars, the amount fixed by the arbitrators as the value of the lots, with interest from the 4th of February 1850, until paid; and that as soon as such payment was made or tendered by the plaintiff, the defendants should execute and deliver to him a good and sufficient deed with general warranty for said lots described in said agreement. From this decree the defendants obtained an appeal to this court.

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Gilmer, for the appellants.

Putton and Patton, Jr. for the appellee.

SAMUELS, J. I am of opinion to reverse the decree, and dismiss the bill without prejudice to the rights of the parties to sue at law. There is nothing alleged in the pleadings, or shown by proof, to warrant the exercise of the power to decree specific performance. This would be my opinion if the case stood alone upon that clause of the agreement which is supposed to bind the appellants to convey. The case, however, should not be so regarded; but in passing on it, every part of the agreement should be looked to: we should not disregard any part of it. It is distinctly agreed between the parties, that the action of ejectment between them shall be submitted to the arbitrament of the referees named; that the value of the subject in controversy shall also be ascertained by those referees; that upon the return of the award the appellants should convey to the

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appellee the subject of controversy. This part of the agreement is, of necessity, to be understood as meaning that the conveyance shall be executed if the action of ejectment shall be decided by the referees in favor of the plaintiffs therein: for it would be absurd to construe it as meaning that if decided the other way, the parties having no title should sell, and the party having title should buy.

The agreement further provides that the submission shall be made a rule of court, and that the court should enforce the performance of the agreement as if the same were a judgment of the court. This, if it means any thing, means that the purchase money was to be secured by the judgment of the court. The parties, to some extent, put their own construction on the agreement by submitting the ejectment suit to the arbitrators; thereby showing that the decision of that suit was to have its effect upon the agreement. In the ejectment the main question was, who had the right to possession, and incidentally, who should pay the costs of suit. This question is not yet decided; the award returned being upon a subject in no wise involved in the suit. By the express terms of the agreement, the conveyance was to be made upon the return of the award, which has not yet been made. If the parties intended to submit the sole question of value to the arbitrators, and to bind themselves to sell and buy at their valuation, nothing would have been easier than to have so provided in the agreement. If, however, they intended that the question of title should be first settled, that if the appellants had the better title, they should sell to the appellee, the agreement in all its parts should be allowed to stand, and its several provisions be carried into effect. To tear one single provision of the agreement from its context; to give it priority over another to which it was expressly postponed; to make it, in fine *the agreement* in disregard

of all else therein; to withhold from the appellants the benefit of their better title, if they have it; to compel them to sell a title in litigation, at a price affected by the fact that it was contested, in disregard of the provision for settling the question of title, would be unjust to both parties. I am not aware of any precedent requiring us to treat the agreement in this manner; and I am utterly opposed to making such precedent.

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DANIEL, J. If the order of reference of the 2d of January 1851 were alone to be looked to for the terms of the submission, the award would be incomplete; as by the order "all matters in difference between the parties" are submitted to the "final determination" of the arbitrators, whilst by the award nothing is adjudged or ascertained except the value of the lots in controversy. It is most apparent, however, from the award, from the bill, from the answer, and from the petition for an appeal, that the arbitrators and the parties all regarded, and acted upon, the agreement of the day of December 1850, as containing the true terms of the submission.

Treating the agreement, then, as the warrant for the action of the arbitrators, I can discover no plausible reason for saying that they have, in any manner, departed from the authority, or fallen short of a complete discharge of the duty conferred upon and prescribed for them. After reciting the pendency of the action of ejectment, and that it involved the title to certain lots, and expressing the desire of the parties finally to settle the suit, the agreement proceeds, "Now, therefore, it is herein agreed that the said parties shall forever end and conclude the controversy, in said suit mentioned, in manner and form following, to wit: That the matters in controversy shall be and are hereby referred and submitted to the final award

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and determination of Robert Edmond and B. W. Haxall, agreed to and chosen by the said parties as their arbitrators, so as the said arbitrators do make their award and determination of and concerning the said controversy, *for the following end and purpose, to wit: that is to say,* that the said arbitrators after having satisfied themselves of the value of the said lots above mentioned and numbered, shall affix to, and declare in writing, under their hands and seals, the real and actual value of the same, as they, in the exercise of their judgments, shall think right and proper, and if they the said arbitrators do not agree as to the value of the said lots, then the said arbitrators shall call in some disinterested third person, to be by them chosen and elected, who shall with them confer and consult as to the value of the said lots, and, with them, determine the same, and shall declare in writing, under their hands and seals, the said value; to be delivered to the parties hereto, on or before the day of next ensuing."

The words in the first portion of the article would seem to indicate an intent to submit the whole matter in controversy to the arbitrators; but it is obvious that, with the words (which I have italicised,) "for the following end and purpose," &c. commences a qualification or restriction, limiting the action of the arbitrators to the single "end and purpose" of ascertaining and declaring the value of the lots. With respect to the title to the lots, the arbitrators had nothing to determine or award. Their office was done, and the object of the first article accomplished, as soon as they fixed and reported the value of the lots; and a subsequent article provided that upon the return of the award, the parties of the first part should convey the lots to the party of the second part, and that the latter should secure and pay to the former the value ascertained by the award. In short, the scheme for

the settlement of the suit was, that the appellants should sell and the appellee should buy the lots at a price to be fixed by disinterested valuers. There is, therefore, I think, no ground for assailing the decree as being founded on an insufficient award.

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Nor do I think that the error of the court in requiring Mrs. Branch, a married woman, to execute a deed with *general warranty*, is of such a nature as to vitiate the decree. The inadvertence is one which it is obvious could work no injury to Mrs. Branch, or any one else; in as much as by the statute, Code, ch. 121, § 7, p. 514, such a deed could not operate any further on her or her representatives than to pass such right, title and interest as at the date of such deed she might have in the estate thereby conveyed. If, therefore, there were no other objection to the decree, I should feel no difficulty in affirming it, after making the proper correction.

In considering the case, however, a more serious question has arisen, which, at the instance of the court, has been fully discussed at the bar; and that is, whether the coverture of Mrs. Branch did not stand in the way of any decree, for a specific performance of the agreement and award against her or her husband, or indeed any of the appellants: It is not necessary to cite authorities to show that no such decree could be made against *Mrs. Branch*.

The question whether a court of equity will, under any circumstances, decree against a *husband* the specific performance of a contract on his part to procure the conveyance by his wife of her real estate, is one which cannot be regarded as yet definitively settled in England. In the reports of the earlier cases, numerous precedents may be found in which the power of the chancellor to make such decrees has been asserted and enforced. Thus, the case of *Hall v. Hardy*, 3 P. Wms. 187, in which, upon a submission of a dispute

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touching the fee simple of a parcel of land, the arbitrators awarded that the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and his heirs, the master of the rolls, Sir Joseph Jekyll, decreed a specific performance of the award: prefacing the decree with the remark that there had been a hundred precedents, where, if the husband, for a valuable consideration, covenants that the wife shall join with him in a fine, the court has decreed the husband to do it; for that he had undertaken it and must lie by it, if he does not perform it.

In some of the cases of a later date, however, the propriety of making such decrees has been seriously questioned, and in others, positively denied; as in *Emery v. Wase*, 8 Ves. R. 505; *Daris v. Jones*, 4 Bos. & Pull. 267; and *Martin v. Mitchell*, 2 Jac. & Walk. 413. And whilst it cannot perhaps be said that the English chancery has fully disclaimed the power, it may, I think, be safely affirmed, that the current of professional feeling and sentiment in England is rapidly tending to a conviction of the impolicy, cruelty and unfairness of a rule which constrains the wife indirectly through the sufferings of the husband, to do that which the courts have long since repudiated their right to coerce her to do directly. In speaking of the earlier cases, Mr. Jacob, in a note to 1 Roper on Husband and Wife 547-8, says, "It may be said with respect to most of these cases, that they were decided at a period when the courts exercised a much greater latitude than at present in cases of this kind. Thus it would seem that in some instances the decrees were made against the wife personally. In one case it was decreed that a man should compel his wife and another man's wife to levy a fine, &c. Since the limits of the jurisdiction of equity in the specific performance of agreements, and the rules as to the disabilities

of coverture have been more clearly settled, these early cases cannot now be received as authorities without some qualifications."

And in the case of *Emery v. Wase*, Lord Eldon said that the argument showed "the point was not so well settled as it had been understood to be. The policy of the law is, that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long before I should say the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that may afterwards be practiced to procure it. The purchaser is bound to regard the policy of the law, and what right has he to complain, if she, who according to law cannot part with her property but by her own free will, expressed at the time of that act, of record, takes advantage of the *locus pacitentiae*; and why is he not to take his chance of damages against the husband?"

Similar views are strongly presented in a note in 1 Roper on Husband and Wife 545; and the annotator adds, "some of the cases seem to have proceeded partly upon the fact of the wife having herself been a party, or having assented to the agreement, or upon the presumption that she had assented. But if it be law that the agreement of a feme covert is void, it is difficult to find any principle upon which her assent or dissent at the time of the contract could vary the case." These views are also adopted in Bright on Husband and Wife, vol. 1, p. 191, to which author, as also to the notes to *Emery v. Wase*, reference may be had for a statement of the principal English decisions on the subject.

I do not know that the question has ever been distinctly before this court on a bill, filed by a vendee, seeking the specific execution of a contract for the sale, by a husband or by a husband and wife, of the wife's lands.

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In the case of *McCann v. Janes*, 1 Rob. R. 256, the bill was filed by a vendee against a husband on an undertaking by the latter, that he and his wife should make to the plaintiff a good deed for the wife's inheritance in fee; but a specific performance of the agreement was not asked. After setting out the contract, the bill alleged that the defendant had refused to comply, stating, as his excuse, that his wife had refused to join him in the deed. It further alleged that there were children of the marriage, and that the husband was consequently entitled to a life estate; and the prayer was that the defendant should be decreed to convey all his interest in the land to the plaintiff, reserving to the latter his right of action at law against the husband for damages on account of his failure to procure his wife to unite with him in the conveyance.

The Circuit court sustained a demurrer to the bill, and rendered a decree dismissing it. On an appeal, the decree was affirmed by this court. The judge of the Circuit court, in his opinion, assigned two reasons for sustaining the demurrer: 1. That he could not entertain a bill for a specific performance in part, with a right to resort to a court of law for the recovery of damages for the residue: And 2. That a husband could not be decreed to convey a life estate in his wife's lands during her life. No reason was given by this court for affirming the decree; but the reporter, in a note to the case, states that he had been informed by one of the judges that the affirmation was made on the first ground taken in the opinion of the circuit judge.

It will be seen from this statement of the case that it did not present the question under consideration. The failure of the plaintiff, however, to ask a decree for specific execution of the contract, is a strong circumstance to show an acquiescence by the bar in the propriety of the doctrine on the subject, held by this

court in the cases of *Evans & wife v. Kingsberry*, 2 Rand. 120, and *Watts v. Kenney and wife*, 3 Leigh 272; in each of which, though the bill was filed by husband and wife for a specific execution against a vendee under a contract with the husband for the purchase of the wife's land, the court considered it necessary to decide what ought to have been the decree if the suit had been brought by the vendee; and in each of which the court, holding that such a decree could not have been properly rendered in favor of the vendee, refused to decree specific performance in favor of the vendors, on the score of want of mutuality. In the last mentioned case Judge Tucker, delivering the opinion of the court, said, "As to compelling the husband to procure a conveyance, the doctrine, never well received, has never been acted upon with us, and seems recently to have been discountenanced in England. *Emery v. Wase*, 8 Ves. R. 505; 4 Bos. & Pul. 267. It is true that in a recent case it has been said that if the wife assents, the husband will not be permitted to recede. *Howell v. George*, 1 Madd. R. 1-7. But so easy is it where family convenience and profit concur, for the influence of the husband to withhold the assent of the wife, that practically the doctrine can never be of use."

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This opinion was approved by the whole court, as was also that of Judge Green of the like import, in the case of *Evans & wife v. Kingsberry*. Whilst, therefore, I do not find any precedent in our reports of a direct refusal by this court to decree at the suit of the vendee, the specific performance of a sale by a husband of his wife's estate, yet in the absence of any case or opinion here questioning the propriety of the two last cited decisions, I feel no hesitation in recognizing them as true expositions and ruling adjudications of the law of this case.

It is true that no objection to a specific performance

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was made by the defendants in their answer, on the score of Mrs. Branch's coverture; and it is urged on behalf of the appellee, that this court ought not to proceed on the supposition that she may not be willing to unite in the conveyance. The same feature existed in the case of *Emery v. Wase*. Yet it was not regarded by the master of the rolls, when the case was before him, (5 Ves. R. 847,) or by Lord Eldon, on the appeal, (8 Ves. R. 505,) as a circumstance of any moment.

In that case, as in this, the defendants all united in one answer, in which they resisted the decree, on grounds wholly independent of the coverture of some of the female defendants; yet the court gave the same weight to the objection as if it had been distinctly and formally presented. The appellants all strenuously resisted the decree in the Circuit court, and are all seeking to reverse it here; and little if any chance of benefit to the appellee could be anticipated from sending the case back, in order, by privy examination, (if indeed such a practice could in any case be allowed here,) to ascertain whether Mrs. Branch will choose to unite in a deed, as there can be little or no doubt as to what her response would be.

It is further urged by the counsel of the appellee, that though this court should be of opinion that the decree was wrong in ordering a full and entire performance of the agreement, still a dismission of the bill would not be the proper or necessary consequence; that in such case the court ought to allow the appellee the election to have a conveyance of so much of the subject he bargained for as is within the reach of the court, with an abatement of the purchase money proportioned to the share or interest of Mrs. Branch.

If the appellee is willing to accept, in satisfaction of the agreement, a deed for the undivided interests of the appellees Clark and Harris in the lots, with an abatement of the purchase money equal in value to

the entire interest and estate of Mrs. Branch in the subject, I cannot perceive the injustice or inconvenience of allowing him to have such a modified performance of the contract. There is nothing in the proofs to impeach the fairness of the agreement or the award. There is not the slightest reason for imputing fraud or even laches to the appellee. He has promptly done or tendered to do every thing which by the covenant or the award he has agreed, or has been awarded to do. On the other hand, the appellants have wholly refused to conform to the award. They have resisted it on each side of the Circuit court, on grounds of objection which the judge has decided to be insufficient. Like objections have been made here, and have met with the same fate. And nothing stands in the way of affirming, in every thing, the decree for a specific execution, except the want of power in the court to coerce a conveyance of the estate of the married female appellant: a difficulty, suggested here for the first time. In this state of things what show of equity have the appellants for insisting that because they cannot comply with their whole undertaking, they shall also be excused from performing such portion of it as is clearly within their power?

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I see nothing in the nature of the contract, and know of no rule of practice, which forbids a termination of the controversy in the mode proposed. On the contrary, it is a familiar practice to make decrees for the partial performance of contracts, with compensation to the injured party, in cases where the measure of compensation is certain or easy of ascertainment. Thus, in *Mortlock v. Buller*, 10 Ves. R. 292, 316, Lord Eldon says, "If a man having partial interests in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent for him to say afterwards, though he

1855. has valuable interests he has not the entirety, and January Term. therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; *and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement.*"

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The same doctrine is asserted in *Wood v. Griffith*, 1 Swanst. R. 43, 54. "The purchaser may insist on having the estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give."

And Judge Story, in the second volume of his Treatise on Equity Jurisprudence, § 779, on the authority of a number of cases which he cites, states the general rule in such case to be, "that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the *title*, quantity, quality, description or other matters touching the estate."

It is true that he says, "the practice had been extended beyond the true limits to which every jurisdiction of the sort should be confined, as it amounted *pro tanto* to the substitution of what the parties had not contracted for; and that the tendency of modern decisions is to bring the doctrine within such moderate bounds as convenience and equity indicate as its proper limits." He at the same time, however, cites with approbation the remarks of Lord Langdale in the case of *Graham v. Oliver*, 3 Beav. R. 124, in which, after admitting the difficulties that existed in the way of carrying the rule to the extent that had prevailed in some of the cases, he vindicates the justice of adhering to it in cases where it can be observed "without any great preponderance of inconvenience."

And a distinction is very properly recognized by the courts between the case of a vendor seeking to compel the vendee to perform, and that of the vendee asking a performance by the vendor. Though, therefore, the courts have refused, as in *Dalby v. Pullen*, 3 Sim. R. 29, and in other cases, to compel a vendee, who has contracted for the entirety of an estate, to take undivided aliquot parts of it, it by no means follows that it is improper to compel the vendor to convey such undivided parts, where the vendee is willing to accept them, with a proper abatement of the price, in lieu of the whole estate for which he contracted. On the contrary, in the case of the *Attorney General v. Day*, 1 Ves. sen. 218, Lord Hardwicke, whilst refusing to compel a vendee who had contracted for an entire estate, to take a moiety, (a conveyance of the other by change of circumstances being impracticable,) said, "On the other hand, if on the death of one of the tenants in common who contracted for a sale of the estate, the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) he might have a conveyance of the moiety from the survivor, although the contract cannot be executed against the heirs of the other."

The same principle is fairly to be deduced from the case of *Roffey v. Shallicross*, 4 Madd. R. 227, and also from a decision of Lord Eldon, in *Ex parte Tilsley*, reported in the note to that case; and is, I think, fully sustained in Sugden on Vendors, vol. 1, 415-426, 7th Am. ed. as well in the text as in the authorities cited in the notes.

It is suggested that these views are in conflict with the decision of this court in *Bailey v. James*, 11 Gratt. 468. On an examination of that case it will be seen, that it is wholly different in character from the one

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before us: And I mention it only because of the suggestion just mentioned, and for the purpose of saying that I do not mean to call in question the authority of *that* case by any thing said in *this*.

I can see, therefore, no objection to allowing the appellee to have a partial performance to the extent and on the terms above indicated. I do not think, however, that he ought to have a conveyance of the life estate of the appellant Branch, unless he is willing to take that together with a conveyance of the undivided interests of the appellants Clarke and Harris in full of his demand. The difficulty of estimating the value of Mrs. Branch's interest, subject to the life estate of her husband, would of itself constitute a serious objection to decreeing compensation for its loss. *Evans v. Kingsberry*, 2 Rand. 120. Such an estimate would of necessity be of a speculative character; and whilst there are rules for calculating the value of such interests, which have been adopted by the court in cases rendering such calculations necessary, I feel no disposition to multiply, unnecessarily, occasions for a resort to them.

It is true that in a note in 1 Roper on Husband and Wife 549, it is suggested that in cases where the wife has only a partial interest in the estate as jointure or dower, the purchaser might be allowed to take such title as the husband can give, deducting from the purchase money a compensation for the wife's claims. Be that as it may, I have seen no case in which a purchaser from husband and wife of the wife's inheritance has been allowed to take the husband's interest, and compensation for the principal estate, the main and substantial object of the contract, left outstanding in the wife.

On the whole, I think that the decree ought to be reversed, and the cause remanded, with instructions to the Circuit court to allow the appellee the option of

taking a conveyance by the appellants Harris and Clarke, and the male appellant Branch, of their interests in the lots, the appellee paying the full amount of the value awarded, or a conveyance of the undivided shares of Harris and Clarke, with a deduction from the full amount of the value aforesaid, of so much thereof as is equal to the value of Mrs. Branch's undivided share in said lots; and in case the appellee refuses to avail himself of such liberty, to dismiss his bill, with costs, but without prejudice to his legal rights.

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ALLEN, P. I concur in the opinion and decree, except so far as it gives to the appellee the right to take a conveyance of the undivided shares of Harris and Clarke, with a deduction from the full amount of the value, equal to the value of Mrs. Branch's undivided share in the lots. I think the contract was entire, and the appellee should be allowed the option of taking a conveyance of Harris and Clarke and the male appellant Branch in satisfaction of the entire contract, or that his bill should be dismissed, without prejudice to his remedy at law.

MONCURE and LEE, Js. concurred in the opinion of **DANIEL, J.**

The decree was as follows:

The court is of the opinion that the decree of the 19th February 1853 is erroneous, and doth adjudge, &c. that it be reversed with costs, &c. And the cause is remanded to the Circuit court, with instructions to allow the appellee the option of having a decree for a conveyance of the undivided shares of the appellants Harris and Clarke, and of the interest of the appellant David M. Branch in the lots in the bill and proceedings mentioned, on the terms of first paying the sum

1855. of four hundred dollars, the amount ascertained, by
January Term. the award of the arbitrators in said bill and proceedings
also mentioned, to be the value of said lots, with
interests from the 4th day of February 1853 until paid,
or a decree for a conveyance of the undivided shares,
in said lots, of Harris and Clarke only, on the terms
of his first paying so much of said sum with its interest
as shall remain after first deducting therefrom
so much thereof as the said Circuit court, treating the
sum aforesaid as the value of the full estate in said
lots, shall ascertain to be the value of Mrs. Branch's
undivided share therein. And in case the appellee
shall refuse to avail himself of the option so allowed,
to dismiss his bill with costs, without prejudice to his
legal rights.

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1. Administrator with the will annexed having in his possession slaves of his testator, and being in doubt whether they are emancipated by the will, may come into equity, making the legatees and next of kin of the testator, parties, and ask the court to construe the will: And in this suit, the court, being of opinion that the slaves are emancipated by the will, may decree in their favor, and direct that they be freed.
2. Testator bequeaths the whole of his slaves, not before disposed of, to trustees for the use of J for her life; and directs that at the death of J the slaves embraced in this clause of his will be emancipated. But should they or any of them prefer remaining in the state, they can do so by choosing masters, to serve during the life of the person chosen, and then they are to have the option of freedom or slavery, by making a second choice. HELD:
 1. The slaves are emancipated; and the condition is repugnant and void.
 2. The slaves born during the life of J are emancipated.
3. The administrator having filed his bill after the death of J, when there were no debts of the testator; and having submitted the slaves to the control of the court; and they having been hired out by him under the direction of the court, during the pendency of the suit; they are entitled to have these hires: And this especially, as though the bill was filed before the act of 1850, Code, ch. 106, § 8, p. 465, it was not decided until after that act went into operation.*
4. All persons having an interest, or color of interest, in the residuum of an estate, must be parties in a suit in which the court decides upon the construction of the will affecting that residuum.

* The act says: "When slaves are emancipated by will, the net proceeds of the aggregate of their hires and profits, with which the personal representative of the testator is chargeable, or so much thereof as may not be required for the payment of debts, shall, unless inconsistent with the manifest intention of the testator, belong to the persons so emancipated, and be apportioned among them as a court of equity having cognizance of the case may deem just."

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Previous to the 2nd day of February 1835, Thomas O. Taylor departed this life, having first made his will, which was duly admitted to probat in the County court of Powhatan. By the first clause of his will, which was wholly written by himself, he directs all his debts to be paid; though he expresses the belief that there are none. By the second, third and fourth clauses, he directs certain of his slaves to be liberated, or at their option to remain in the state and choose masters. The sixth, seventh and eighth clauses of the will are as follows:

Sixthly. The residue of my property, both real and personal, lands, lots and improvements, money, goods and chattels, rights, credits, interests and effects of every description whatsoever and wheresoever being, as well such as I may hereafter acquire, as those which I now possess, with the positive exception of my slaves of every description, I devise and bequeath unto Holden Rhodes and Archer L. Wooldridge, of the county of Chesterfield, and the survivor of them, and the heirs and assigns of such survivor forever, upon the following trust and confidence, nevertheless, that the said trustees, and the survivor of them, and heirs and assigns of such survivor, shall hold all my said property during the coverture of Mrs. Caroline M. R. Johnson, by her husband, Dr. Edward Johnson, in trust for her sole, separate and exclusive use, benefit and advantage, free and exempt from the control, debts, contracts and incumbrances of her said husband; and I request my said trustees to permit all my property aforesaid to be and remain in the possession of the said Mrs. Caroline M. R. Johnson, during her coverture aforesaid, subject, together with all the rents, hires, issues and profits thereof, solely and entirely to her management, control and disposition at all times, unless at any time it shall be necessary to take the same into their possession, in order to pre-

vent or exclude the control or interference of her said husband; in which event they are hereby authorized to take the same into their possession and under their management, paying and applying the rents, hires, issues and profits to said Mrs. C. M. R. Johnson, or as she shall direct. It is further my will and desire that the said C. M. R. Johnson, during her coverture aforesaid, have power, and she is hereby empowered to sell, exchange, lease, mortgage, encumber and dispose of all and every portion of my property aforesaid; and for that purpose the said trustees and the survivor of them, and the heirs and assigns of such survivor, are hereby authorized and directed, whenever they shall be thereto requested by the said Caroline M. R. Johnson, by any writing under her hand attested by two or more credible witnesses, to make and execute all such deeds as shall be necessary and proper to give due effect to the power aforesaid. And the lands, money and other effects received or accruing from such sale, exchange or other disposition, shall be held, conveyed and assured to the same trusts, and with the same powers, charges, conditions and exemptions as is herein declared in relation to the property of which I shall die possessed. And for greater certainty, I declare it to be my will and desire that the said Dr. Edward Johnson shall have no right, authority or control over any portion of the property herein conveyed to the said trustees, or over any portion of the proceeds which may arise from any sale or other disposition of the property herein conveyed to the said trustees, or over any portion of the rents, hires, issues and profits of such property and proceeds, but that the same, and every part thereof, shall belong to and be solely and exclusively to the use of Mrs. Caroline M. R. Johnson, during her coverture aforesaid. It is further my will and desire that the said Caroline M. R. Johnson be empowered during her said coverture, and she is hereby

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empowered by any declaration in writing subscribed by her, and attested by two or more credible witnesses in the nature of her last will and testament, to devise, bequeath, limit, appoint and declare the trusts of all and every portion of the property aforesaid, the proceeds and rents, hires, issues and profits aforesaid, remaining at her death, in such manner, and to and amongst such persons as she shall think proper, provided no child or children of the said Caroline M. R. Johnson be selected, to whom and their descendants no portion of my property, or that which I bequeath to Mrs. Caroline M. R. Johnson, is ever directly or indirectly to go. And the said trustees, and the survivor of them, and the heirs and assigns of such survivor, are hereby requested to do all acts, and execute all such deeds as may be necessary and proper to give effect to such declaration and appointment. In the event of the said Caroline M. R. Johnson's dying in the lifetime of her said husband, without having made such disposition and appointment as aforesaid, then it is my will and desire that all the property, proceeds, rents, hires, issues and profits aforesaid, remaining undisposed of at her death, shall be divided into four equal parts, one of which I hereby give, devise and bequeath to Holden Rhodes and Archer L. Wooldridge of Chesterfield county; one-fourth to Miss Malissa and Virginia Harris, daughters of Dr. Francis Harris of Powhatan county; one-fourth to Miss Maria Branch of Manchester; to them, their heirs and assigns forever, and one-fourth to be divided, as may seem best to my executors, amongst my negroes hereafter mentioned. The fourth given to Miss Branch, I hereby empower my executors to place beyond the control or management of her brother, Christopher Branch.

Seventhly, I devise and bequeath to the aforesaid Holden Rhodes and Archer L. Wooldridge, and the survivor of them, and the heirs and assigns of such

survivor, two slaves named Morris and Ellen, in trust, and with the same conditions and restrictions annexed as is required in the management and disposition of the property devised in item the sixth, with this difference, nevertheless, that Mrs. Caroline M. R. Johnson be allowed to make any disposition of them she pleases, either during her coverture or at her death.

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Eighthly. The whole of my negroes not before disposed of or devised, I now devise and bequeath to Holden Rhodes and Archer L. Wooldridge, and the survivor of them, and the heirs and assigns of such survivor, in trust, for the benefit and use of Mrs. Caroline M. R. Johnson, during her life, with the same restrictions and conditions annexed, as are required in the management and disposition of the property devised in the sixth item in this instrument. At the death of Mrs. Caroline M. R. Johnson, it is my further will and direction that the slaves embraced in this item be emancipated, and one-fourth of the property which Mrs. Johnson may not dispose of at her death, as required in item the sixth, be distributed amongst them as may be deemed most equitable by my executors. But should a part or the whole of the negroes prefer remaining in the state, they can do so by choosing masters to serve during the life of the person or persons chosen, at the death of whom they shall have the option of freedom or slavery, by making a second choice.

The above will and testament may be deficient in technical nicety: my intentions are nevertheless obvious: those I wish to be the sole rule in its interpretation and construction. I have been obliged to mention my negroes in families or collectively, because being unacquainted with the names of some of them, I am unable to particularize.

I hereby constitute and appoint Holden Rhodes and Archer L. Wooldridge, of the county of Chesterfield,

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executors to this my last will and testament. In witness whereof, I hereunto set my hand and affix my seal this third day of April one thousand eight hundred and thirty.

The nominated executors and trustees refusing to act, the estate was committed for administration to Benjamin Watkins, sheriff of Powhatan county; and Higgison Hancock was substituted as trustee, and acted as such until 1836, when William M. Watkins was appointed in his place. In 1839 the administration was committed to Hancock.

Mrs. Caroline M. R. Johnson died in 1849, having survived her husband who died in 1841. She made a will by which she disposed of the estate of Thomas O. Taylor to Philip T. Hancock, an infant son of Higgison Hancock, provided neither he nor his heirs or executors should sue her heirs or executors: And a subject of controversy in this suit was the validity of that appointment. Another question was as to the liability of Mrs. Johnson's estate for certain lands and bonds disposed of by her in her lifetime; but neither of these questions was considered by the court, and need not be further noticed.

After the death of Mrs. Johnson, Hancock the administrator *de bonis non* with the will annexed of Thomas O. Taylor, in November 1849 filed his bill in the Circuit court of Powhatan county, for the purpose of having a construction of the will of Taylor, and directions as to his duties. He set out the provisions of the will, the will of Mrs. Johnson in execution of the power vested in her by the sixth clause of the will of Thomas O. Taylor, a statement of the property of Taylor at his death, and the sale of some of it by Mrs. Johnson. He stated that the slaves directly emancipated by the will of Taylor had been set free before his qualification: That those emancipated at the death of Mrs. Johnson were under his care, hired

out for that year; and he submitted them and their rights, and his own duties in regard to them, to the decision of the court, seeking only to be protected against future complaint from any quarter: and he prayed to be advised what disposition to make of their hires for that year, and what to do with them thereafter. He did not know that there were any debts against the estate of Taylor, but could not admit that there were none. And he was advised that there were questions arising under the will of his testator, which should be settled by the judgment of the court: And he proceeds to state them, and among others, the question as to the effect of the will upon the slaves of the testator.

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He further stated that Taylor died unmarried; that he was moreover the only child of his father, who had come to this country many years before, as was supposed, from Great Britain; but that the plaintiff was wholly ignorant as to who were the heirs and next of kin of his testator. And making Benjamin Watkins the former representative of Thomas O. Taylor, and William M. Watkins the trustee, the heirs of Mrs. Johnson, and her devisees under her will disposing of her own property, the legatees under Taylor's will, and the slaves by name, parties defendants, he prayed that the matter of the bill might be fully settled, and such decrees made therein as should be agreeable to equity, and the nature of the case should require.

By an amended bill the next of kin of Thomas O. Taylor on the part of his mother were made parties.

On the motion of the plaintiff, Richard W. Flournoy was appointed guardian *ad litem* of the slaves, to defend them in this suit; and he filed an answer submitting their rights to the protection of the court. And the court made an order directing the plaintiff to collect the hires of the slaves for that year; and to hire them out from year to year until the further order of the court.

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In 1851 many of the next of kin (for they were very numerous) answered the bill. They contested the validity of the appointment made by Mrs. Johnson; and they insisted that the slaves left to Mrs. Johnson for life were not emancipated by the will; there being, as they insisted, an illegal condition attached to the bequest of freedom which avoided it: And they insisted further, that even if the slaves who were alive at the death of Taylor were emancipated, the provision in the will did not include those slaves who were born after the death of Taylor and during the lifetime of Mrs. Johnson.

At the same term of the court the cause came on to be heard, when the court held that the slaves bequeathed to Mrs. Johnson for life became entitled to their freedom at her death; and that the provision authorizing them to choose masters was void; and decreed accordingly. And the plaintiff was directed to hire them out until the further order of the court.

In December 1851 the cause came on to be again heard, when the court declared that according to the true construction of the will of Thomas O. Taylor, Mrs. Johnson had power during her coverture to dispose of the lands of the testator by will; and that such disposition was not invalidated by her becoming discovert; and that the appointment in favor of Philip T. Hancock was valid. And the plaintiff was directed to hire out the slaves for four months from the 1st of January then next.

In the progress of the cause a commissioner made reports as to the hires of the slaves since they had been under the control of the court. These reports showed that of these hires there was deposited in bank by the plaintiff on the 31st of December 1851, seven hundred dollars, produced from the hires of that year; and that there was deposited in March 1852 the further sum of four hundred dollars; and there was in his hands on the 31st of May of that year a further

sum of two hundred and nineteen dollars and seventy-two cents. A second report showed a further sum of one hundred and seventy-three dollars and two cents in the plaintiff's hands on the 31st of December 1852.

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The cause came on to be finally heard in January 1853, when it appearing that the plaintiff's powers as administrator &c. of Taylor had been revoked, and that the estate had been committed to Henry Gordon, sheriff of Powhatan, the court made a decree directing the plaintiff to deliver to Gordon the negroes in his hands belonging to the testator's estate; and that Gordon do cause them to be registered as free in the court of Powhatan county, and to be furnished with certificates thereof. And the said Gordon was authorized to divide the money deposited in the bank equally among the said negroes; and that the amount in the hands of the plaintiff, after defraying some charges mentioned in the decree, should be paid to those of the negroes who had earned it: such payments to be made when they respectively received their certificates of registry. Whereupon the next of kin of Thomas O. Taylor obtained an appeal to this court.

Giles and C. Robinson, for the appellants.

Day, for Johnson's devisees.

Davis, Rhodes and Patton, for the administrator and the slaves.

SAMUELS, J. The appellants' counsel in the argument here insisted, that the slaves were improperly made parties in this case, (referring to the case of *McCandlish v. Edloe*, 3 Gratt. 330,) and that a decree of emancipation can be rendered only in a suit brought *in forma pauperis* for the recovery of freedom; and that, for these reasons, the Circuit court erred in deciding the question as to the condition of the slaves. In answer it may be said that Hancock having the alleged

1855. slaves in his possession, and being unwilling to decide
January Term. the conflicting claims between them and Taylor's next
Osborne & als. of kin, might be allowed to file a bill in equity re-
ferring the subject to the adjudication of the court,
Taylor's adm'r & als. v. and thereby relieve himself from the responsibility of
making a decision. A bill of this nature, in its func-
tions, is a bill of interpleader; the adverse claimants
become actors; each, asserting a claim, is, in effect, a
plaintiff. A claim to freedom, if merely equitable,
has long since been held a proper subject for the cog-
nizance of a court of equity. A mere question of pro-
perty between adverse claimants could be passed on
by a court in a case like this. A right to freedom
claimed on one side, and a conflicting right of pro-
perty claimed on the other, must stand on the same
ground; and this especially where if either claim had
been asserted in a separate suit, it would have been
proper for the cognizance of the court. I am of opin-
ion the slaves should be regarded as plaintiffs assert-
ing their claim to freedom. The defect of the bill is
merely in form; the substance is sufficient, as it brings
before the court the adverse claims of the parties.

It may be further said that this suit was pending on
and before the 1st July 1850, when the Code of 1849
took effect, and the answer of the appellants was filed
after that day. It is therein provided, ch. 216, § 2, p.
800, that subsequent proceedings in pending suits
shall conform as far as practicable to the provisions of
that act; and in ch. 171, § 19, p. 648, 649, it is en-
acted that when a bill shows on its face proper matter
for the jurisdiction of the court, no exception for want
of such jurisdiction shall be allowed, unless it be taken
by plea in abatement; and the plea shall not be re-
ceived after the defendant has demurred, pleaded in
bar or answered the bill. The bill in this case shows
matter proper for the jurisdiction of the court, in this,
that Hancock held slaves who claimed their freedom

under an equitable title, and who are claimed as property by Taylor's next of kin, under an equitable title. Hancock had the right to invoke the aid of a court of equity to relieve him from the responsibility of making a decision upon these conflicting claims. The appellants have been content to assert their rights in the suit brought by Hancock, making no objection to the jurisdiction of the court or to the competency of any party or parties; and they should not be permitted to make such objection for the first time in this court.

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If however it be conceded that the slaves were not necessary or proper parties, then the case must be considered as if they had been omitted as such. If they had been thus omitted, the omission would not have precluded the court from decreeing their emancipation in a proper case in which the persons claiming them were parties. This was done in *Pleasants v. Pleasants*, 2 Call 270, (Tate's edition.) The bill in that case was filed against the claimants, but omitted to make the slaves parties; their emancipation was nevertheless decreed. In *Elder v. Elder's ex'or*, 4 Leigh 252, the bill was filed by a legatee against the executor, omitting the slaves as parties, yet the court decreed the freedom of the slaves.

The objection by the appellants, next in order is, that the slaves, or some of them, are not emancipated by Taylor's will; that even if such of them as were in being at his death were emancipated from and after Mrs. Johnson's death, yet that such of them as were born after Taylor's death, and before Mrs. Johnson's death, being the issue of mothers in the condition of slavery, are themselves slaves.

The first branch of this objection is insisted on, because, as is alleged, the slaves were left by the will in the condition of slavery at the death of Mrs. Johnson, with the capacity to become free upon their election to become so; and until the election shall be made,

1855. they remain in the condition of slavery: And we are referred to the case of *Elder v. Elder's ex'or*, above cited. This part of the objection is founded on a misapprehension of the will. The counsel construe the will as directing that the slaves shall remain such until they elect to become free; whereas the will, in a substantive clause, distinctly manumits them; and afterwards, in another clause, gives them the election to remain in the state of Virginia, in a condition intermediate between slavery and freedom. The latter alternative is against the settled policy of the law, and has no effect. *Forward's adm'r v. Thamer*, 9 Gratt. 537. The bequest of freedom is in no wise impaired by the impracticable and repugnant alternative offered to the choice of the slaves. In regard to the issue of the female slaves born after the death of Taylor and before the death of Mrs. Johnson, it is insisted that they are slaves; that they remain in the condition of their mothers at the time of their several births: and the case of *Maria v. Surbaugh*, 2 Rand. 228, is referred to in support of this branch of the objection. If we concede to the case just cited all the effect which can be claimed for it in cases in which it applies, yet the rule thereby established does not govern a case like this. In our case the testator bequeaths his slaves by the general description, "the whole of my negroes not before disposed of or devised," in trust for Mrs. Johnson's benefit during her life; and declares, that "at the death of Mrs. Johnson, "it is my further will and direction that the slaves embraced in this item be emancipated." Such a general description has been frequently held to embrace not only the parent stock of slaves in being at the time of the testator's death, but all increase thereafter born, but born before the emancipation was fully perfected. In *Pleasants v. Pleasants*, 2 Call 270, (Tate's edition,) the testator said in his will, "my further desire is, respecting my poor

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slaves, all of them as I shall die possessed with shall be free," &c. These terms were held to embrace all the slaves whenever born, and to emancipate them, as they arrived at the age fixed by the testator for the purpose. In *Elder v. Elder's ex'or*, 4 Leigh 252, the terms "the remaining part of my negroes," were held to include the increase of the slaves born after the death of the testator but before the time for perfecting the emancipation directed by the will. In *Erskine v. Henry*, 9 Leigh 188, the testator gave his slaves to a legatee for life, (as in our case,) and at her death directed "all his negroes to be free and at full liberty." These terms were held to include the increase of the slaves whilst they were in the hands of the life tenant. In *Anderson's ex'ors v. Anderson*, 11 Leigh 616, the testator directed his slaves to be retained in the condition of slavery for a time, but at certain periods, or on certain events, provided for their emancipation, describing them as "all" his negroes. It was held that the issue born of a mother before the time for her emancipation were emancipated by the will. In *Bindford's adm'r v. Robin*, 1 Gratt. 327, the terms used by the testatrix, "that all my negroes be liberated," were held to include not only slaves in possession, but also a reversionary interest in slaves depending upon a life estate; and this, although the life estate did not expire until after the death of the testatrix, and the portion falling to her estate was then for the first time set apart upon partition with other parties interested. In *Lucy v. Cheminant's adm'r*, 2 Gratt. 36, the testatrix bequeathed "all the rest of her slaves" to two for their lives, and to the survivor for life; and on the death of the survivor directed that "said slaves be set free." It was held that all the slaves, including those born during the life estate, were emancipated. These cases establish the rule which must govern this case; and we must hold that all the slaves in being at Mrs.

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It is said by the appellants' counsel, that although all the slaves in being at the time of Mrs. Johnson's death be emancipated from that time, yet they were held in slavery and hired out for some time after their right to freedom accrued; and that the appellants, the next of kin, are entitled to the hires as part of Taylor's estate not disposed of; there being no creditor to claim them or any part of them. To sustain this position we are referred to *Pleasants v. Pleasants*, 2 Call 270; *Paup's adm'r v. Mingo*, 4 Leigh. 163; *Peter v. Hargrove*, 5 Gratt. 12. These cases settle the law as it formerly stood, against the right of freedmen to recover hires of a person holding them in slavery. The judges of this court, from time to time, whilst acquiescing in the decisions referred to, and admitting the expediency and policy on which they were founded, have nevertheless admitted that it would be but natural justice to allow hires to freemen wrongfully held in slavery. Recognizing the cases cited as furnishing the rule in any case in which they apply, it must still be observed that the case before us presents features not found in any other case. In each one of the cases cited the hires claimed had accrued whilst the freemen were detained in slavery by the claimant, either in his own right or in *autre droit*. In our case the hires did not accrue whilst the slaves were held by the administrator, representing the estate. On the contrary, those hires accrued whilst the slaves themselves were under the control of the court, where they had been placed by the administrator. That court took upon itself the duty of executing the trust theretofore confided to the administrator; and although the administrator was directed by the court to perform the duty of hiring out the slaves, still, in obeying the order of the court, he was acting merely as the officer of the court; his

official authority or responsibility as administrator was in no wise involved in the hiring of the slaves; the court had assumed his place and authority. In the progress of the suit it was ascertained that no cause had existed which should have prevented the administrator from setting the slaves at liberty upon the death of Mrs. Johnson. He should therefore have done so, and the freedmen would have enjoyed the fruits of their own labor. On general principles of equity it was the duty of the court, as far as practicable, to place every one in the condition in which he was intended to stand according to the true meaning of the will. Although the time for an exact execution of Taylor's will had passed, yet no reason can be shown why it should not be executed as nearly as practicable. To give the freedmen their hires accrued after they should have enjoyed their freedom will be clearly within the testator's meaning. By giving them freedom he gave the right to enjoy the fruits of their own labor. The court, by giving them the hires under its control will, to that extent, give effect to the will. No considerations of inexpediency or impolicy intervene to prevent this disposition of the fund. The next of kin have never had possession of the slaves, and have had no reason to rely upon the hires as a source of revenue. They have incurred no expense in rearing and supporting them. The difficulty of settling an account of expenses on the part of the owners or claimants and of hires on the part of the slaves does not exist. In fine, none of the reasons which led to the decisions in the cases cited, exist in this case.

If necessary for the decision of this case, it might be a question how far the assent to the legacy for life of the slaves to Mrs. Johnson enured to the benefit of the slaves who were to be manumitted at her death; whether the assent to the legacy for life should be regarded as an assent to the ulterior disposition of the

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property. See *Bishop's ex'or v. Bishop*, 2 Leigh 484; *Lynch v. Thomas*, 3 Leigh 682; *Nicholas v. Burruss*, 4 Leigh 289. In the opinion of a majority of the court, it is not necessary for the decision of this case to pass on the question. I content myself, therefore, with a reference to these cases on the subject.

Regarding the case as standing upon the law existing at the date of Taylor's will, I should have no hesitation in deciding that the freedmen, under the circumstances of this case, are entitled to their own hires. The law since that time, however, has been so changed as to leave less room for doubt. The Code of 1849, ch. 106, § 8, p. 465, by giving a new capacity to freedmen improperly held as slaves under the circumstances of this case, has removed perhaps the only reason not yet considered, for the decisions heretofore made. In *Pleasants v. Pleasants*, before cited, at the date of the will and at the death of the testator, manumission was not permitted by law: yet the testator, anticipating a change in the law, gave directions for the emancipation of his slaves when the law should permit it to be done. When, therefore, the law subsequently permitted freedom to be given by the master and accepted by the slave, it was held that the slaves were free. In our case, the will gives freedom, which contains in itself the right to enjoy the fruits of their own labor. The capacity of the freedman is a subject within the scope of legislative authority; and when that capacity is enlarged by subsequent laws, so as to give them a right to their own hires accrued whilst improperly held in servitude, we should do no more than was done in *Pleasants v. Pleasants*, if we carry the law into effect. In that case the incapacity prevented the slaves from receiving freedom at all; yet when it was removed, the grant became effectual. In our case, as is said, the incapacity was confined to the claim of profits only; this incapa-

city being removed, no reason exists to withhold the hires from the freemen against the intention of the testator Taylor. I think the Circuit court did right in decreeing the freedom of the slaves, and in giving them their own hires.

I am of opinion, moreover, that the court should not have decided the question of succession to the residue of Taylor's estate, (other than slaves,) without having before it all parties who are interested in the question. That residue is claimed on behalf of Mrs. Johnson's estate, and it has, in part, been decreed to the estate; it is claimed by the appellants, the next of kin; and it appears in the record, that Philip T. Hancock has such interest, or color of interest, as to make him a necessary party; a part of the real estate having been decreed to him, although he is no party to the suit. The residuary legatees named at the foot of the sixth clause of Taylor's will, including the emancipated slaves, have also such interest or color of interest in the residue above mentioned, as to make it proper they should be parties to any proceeding for the final adjudication of the conflicting claims thereto.

Thus I am of opinion to affirm so much of the decree as gives freedom to the slaves, and gives them their hires; and to reverse so much of the decree as disposes of any part of Taylor's estate, real or personal, (other than slaves,) with costs to the appellants against Mrs. Johnson's estate; and to remand the cause, with directions to allow the defendants or any of them to file a cross bill, if they shall be advised to do so, to bring more distinctly before the court the subject and questions in controversy, and to cause Philip T. Hancock to be made a party.

LEE, J. concurred in the opinion of SAMUELS, J. except as to the hires of the negroes. He thought that this case was not to be distinguished from the cases which had been decided in this court. He did

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1855. not think that the act of 1849 applied to the case:
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DANIEL, J. concurred in the decree to be rendered, except as to the hires of the negroes before the act of 1849.

ALLEN and MONCURE, Js. concurred in the opinion of SAMUELS, J.

The decree was as follows:

The court is of opinion there is no error in so much of the decree as gives effect to the emancipation of the slaves, as provided for in the will of Thomas O. Taylor, nor in so much of the decree as gives to the emancipated slaves the hires accrued after the death of Mrs. Johnson. It is therefore adjudged and ordered that to that extent the decree be affirmed. But the court is further of opinion that the Circuit court erred in deciding upon the rights of parties to the residue of Taylor's estate, real and personal, (other than slaves,) without having Philip T. Hancock as a party before the court, he having such interest, real or apparent, therein as to make him a necessary party. It is therefore adjudged, &c. that so much of the decree as is declared to be erroneous be reversed and annulled, (with costs to the appellants against Mrs. Johnson's estate,) and cause remanded, with directions to cause Philip T. Hancock to be made a party, and to give leave to the defendants, or any of them, to file a cross bill, if they shall be advised to do so, for the purpose of bringing more distinctly before the court the nature and extent of the subjects in controversy, and for further proceedings.

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Testator gives his estate to his wife during her life; and at her death it is to be equally divided amongst all his children. And the shares of his two daughters, M and B, to be held by them during their natural lives and no longer, and then equally divided between their heirs lawfully begotten. And at his wife's death he directs his lands to be sold and the proceeds divided as aforesaid. **HELD:**

The words "heirs lawfully to be begotten" are words of limitation; and M and B took the whole interest in their shares of the estate.

Josiah Robertson died in 1810, having made his will, which was duly admitted to probat. By his will he gave to his wife Catharine Robinson, the whole of his estate, for her life or widowhood; she paying his debts. The second clause of the will is as follows:

"At the death or intermarriage of my dear wife, it is my will, that my then remaining estate be subject to equal distribution between all my children; and it is my express desire, that the parts of my estate which shall go to my two daughters Mary Murphy and Caroline Brooks, shall be held by them during their natural lives, and no longer, and then equally divided between their heirs lawfully begotten."

By a subsequent clause he directs that on the death or marriage of his widow, the property shall be sold, and the proceeds be equally divided among his children.

Mrs. Robinson seems to have married again about the year 1817, when the property was divided among the children; they all being then of age and the daughters widows, and preferring to take it in kind. Mrs. Brooks received on that division a small tract of land, and a negro woman, who afterwards had several children.

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Caroline Brooks died in 1850, leaving one son and four daughters, who were married. She left a will, by which, after directing the payment of her debts, she left the balance of her estate to her five children; directing that the shares of the daughters should be secured against the control of their husbands and their creditors. Her son William H. Brooks qualified as administrator with the will annexed.

William H. Brooks being about to sell some of the property, all of which was derived from the estate of Josiah Robertson, for the payment of the debts of his testatrix, the daughters and their husbands filed a bill to enjoin the sale, upon the ground that Caroline Brooks their mother took but a life estate in the property, under the will of her father; and that her children were entitled to the fee. The injunction was granted, but was afterwards dissolved. Whereupon they applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellants:

The sole question in this case is, whether or not the rule in *Shelley's Case* is applicable to the bequest in favor of Mrs. Brooks in the will of her father Josiah Robinson. This rule is now abolished in Virginia. It is founded on feudal reasons having no existence in this country; and it has been sustained upon legal partialities and presumptions, repudiated by us as early as the period of our independence. Here the law has no partiality for the eldest son, but all the children are equally its favorites; and equality is the established rule of policy and justice.

This case has been decided in the court below, upon the strictest interpretation of the rule contended for in England, without regard to the changes in our institutions and in the policy of our laws. But even in England, and in relation to real estate, this strictness has not been maintained without a severe struggle, a

struggle which is still continued. There this contest has been going on ever since the announcement of the rule in *Shelley's Case*. By one party almost any words are held to take a case out of the operation of the rule, whilst almost none will effect this object in the estimation of others. Thus the addition of the word heirs to heirs, the words for the life of the first taker "and no longer or not otherwise;" to one for life and to the heirs of his body "equally to be divided," have been the objects of controversy, and upon which the greatest judges of England have differed in opinion.

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For some time before the decision of *Jesson v. Wright* in the house of lords, 2 Bligh's Par. Cas. 1, the weight of the decisions was against the strict application of the rule. That decision is supposed by Jarman and others to have overthrown the long line of cases opposed to it, among them, *Doe v. Luming*, 2 Burr. R. 1100, and *Doe v. Goff*, 11 East's R. 668. But Sir Edward Sugden, who argued the case at great length, did not question the authority of these cases, but attempted to distinguish it from them. *Jesson v. Wright*, in the house of Lords, is in fact the decision of Lords Eldon and Redesdale, who, though they came to the same conclusion, arrived at it by different processes of reasoning founded on different principles; and from that decision we appeal to the same case decided by Lord Ellenborough and Justice Bayley in the King's bench, 5 Maule & Selw. 95.

The case of *Jesson v. Wright* has not settled the rule in England, as is admitted by Jarman, vol. 2, p. 216; and he refers to *Wilcox v. Bellmers*. This case occurred soon after the decision of *Jesson v. Wright*; and both Sir Thomas Plumer and Lord Lyndhurst thought the rule declared in *Jesson v. Wright* so doubtful that they would not compel a purchaser to take a title dependent upon it. 11 Cond. Eng. Ch. R. 266. That case was again doubted in *Right v. Creber*, 5 Barn. & Cress.

1855. 866, and in *North v. Martin*, 6 Sim. R. 266; and Hayes, p. 47, 7 Law. Libr. a great advocate of the rule declared in that case, admits that the question is still unsettled.

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But *Jesson v. Wright* was a case of real estate; whilst in our case the whole subject is personal; for the land is directed to be sold at the death of testator's wife, and the proceeds of the sale to be divided: And this rule has not been applied to personal estate. Jarm. Powell on Devi. 638, 22 Law Libr. Indeed Roper in his work on Legacies, p. 1523—4—5, lays it down as a law of property, that the rule in *Shelley's Case* does not apply to such cases.

But if this feudal dogma is to be applied in England, this is not the case in Virginia under our decisions. The cases here have generally arisen upon limitations over; but there are a few which brought up the question directly. One of the first of these is *Bradley v. Mosby*, 3 Call 44. This is like *Archer's Case*, 1 Coke's R. 66; and it was held that the first taker took but a life estate, and that the words "heirs of her body" were words of purchase. The other cases directly on the rule in *Shelley's Case*, are *Warner v. Mason & Wife*, 5 Munf. 242; *Selv v. Tune*, 6. Munf. 470, which is a direct authority for us in this case; *Tidball v. Lopton*, 1 Rand. 194; and *Pryor v. Duncan*, 6 Gratt. 27; in which last case it was held that the manifest intention of the testator should take the case out of the operation of the rule. We also refer to *McNair's adm'r v. Hawkins*, 4 Bibb's R. 390; *Prescott v. Prescott's heirs*, 10 B. Monr. R. 56; *Shelton v. Henderson & wife*, 9 Gill's R. 432; *Carlton v. Price*, 10 Georgia R. 495; and *McClare v. Young*, 3 Rich. Equ. R. 559.

Hughes, for the appellee, submitted a printed argument:

A life estate in the lands, or freehold, is expressly

given to Mrs. Brooks, and in the same will the estate is limited immediately to her heirs lawfully begotten. The appellee insists that this devise is subject to the well known rule in *Shelley's Case*, and in effect gave to Caroline Brooks a fee simple title to the land. The rule itself, it is presumed, will not be questioned, but only its application to the devise in the present case. Neither is it a question, as it seems to be supposed, whether the rule will yield or bend to the intention of the testator. The *rule* is stern and inflexible, and unyielding even to the strongest and most obvious intention, if the case is within its operation. Hayes' *Essay on the Principles of Expounding Dispositions of Real Estate*, p. 96, 21 Law Libr. "It can never be a question, (says the author), whether the rule is to be applied or not. We might as well ask whether the testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no *exception*." Same work, p. 48; 2 Jarm. on Wills 241-2; 4 Kent's Com. 226, referring to Hargrave's *Law Tracts* 575-7; Thomas' Coke 376 b, note P; *Jones v. Morgan*, 1 Bro. C. R. 206; Fearne on Rem. 188-9. But whether a given case is within the influence of the rule has not always been free from difficulty, nor have the decisions upon the subject been uniform. But it seems to be now well settled that the first thing to be ascertained is, in what sense did the testator use the words employed in the devise? Did he use them in their usual and proper acceptation, or in some other sense? And if in some other, in what other sense did he so use them? When the testator's meaning is ascertained, it is at once seen whether the rule applies. As the difficulty in every case must exist at this point, it can only be removed by applying the ordinary rules of construction, which ought readily to lead to a proper solution. In the case under consider-

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ration the only question must be, in what sense did Josiah Robertson use the word "heirs" in the devise to Caroline Brooks? Did he use the word in its proper and legal signification, denoting thereby those who would succeed to her estate in case of intestacy, and making her the stock or *terminus* by whom the succession should be regulated? Or did he mean particular individuals, or class of individuals? And if so, who were meant, or what class did he mean? If he meant the former, the rule in *Shelley's Case* applies irrespective of any intention he might have had to the contrary. If he meant the latter, the rule has nothing to do with the case.

In applying the rules of construction to ascertain the sense in which the testator used the word "heirs," the first rule to be observed is, that he is presumed to have used the word in its proper and well defined acceptation, denoting thereby the whole line of the legitimate heirs of Caroline Brooks, to the exclusion of none; and this presumption is quite sufficient, unless it plainly appears in the context that the word was used in a restricted sense; which must be so obvious as to preclude all claim to its use in its proper and technical sense. To repel this presumption the meaning must not be vague and conjectural, but clear and unequivocal. If authority is wanted in support of this familiar proposition, we may refer to the opinions of Lords Eldon and Redesdale in *Jesson v. Wright*, 2 Bligh 1; 2 Jarn. on Wills 280; Hayes' Essay above cited, Prop. xv. At page 100, Mr. Hayes remarks, "Every sound principle demands that the context should not merely show that heirs of the body (the words he was considering) are employed in a sense different from their legal and proper sense, but distinctly indicate in *what other* sense they are employed." Apply this test to the will of Josiah Robertson, and there will be found no language in the context suffi-

cient to repel the presumption that he used the word "heirs" in its proper sense; still less is there any thing to show in *what other sense* he did use it. If he did not mean that the estate should go to all the heirs of Caroline Brooks at her death as her own estate would go under the statute of descents, we are left wholly to conjecture as to his meaning. There is nothing to show that he alluded to particular individuals, or to any class of them, and in the absence of a clear indication in this particular, the rule of construction forces the conclusion that he used the word "heirs" in its proper and technical sense—that he was pointing to no particular individuals; but regarding her as ancestor, stock or *terminus* to regulate the succession, he intended the estate at her death to pass to all who might be heirs to her as such stock or terminus, provided only they be legitimate. When we look to what might have been the consequences of a different interpretation, the mind becomes satisfied of the testator's meaning. Suppose we regard the testator as meaning children by the word "heirs," they must be such children as should be living at her death, and *at that time* coming under the description of "heirs." This would not embrace grand children; and therefore, if one or more of her children had died in her lifetime, leaving children, such must necessarily be excluded. Nay, if all her children had died in her lifetime leaving children, none of them could have taken. This is obvious when it is observed that if the children of Caroline Brooks take as purchasers, they take remainders under the will of Josiah Robertson contingent upon their being the "heirs" of Caroline Brooks, that is, of their being alive at her death, and the persons designated by law as *her* heirs. The testator could not have intended to use the word "heirs" in a sense which might lead to such consequences. Attach any other meaning to the word "heirs" in this

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The only expressions in the will which can be appealed to as affording any evidence of an intention of the testator to use the word "heirs" in a sense different from its proper and technical sense, are the words, "during her natural life and no longer," and the words "equally divided," &c. The words "during her natural life and no longer," serve only to mark with more emphasis that the testator intended but a life estate to the first taker. It is conceded that but a life estate was intended to be given to Caroline Brooks, and it is only in cases where but a life estate is so given that the rule in *Shelley's Case* applies. The words "no longer" have even less force than the words "*non aliter*," "only," "without impeachment of waste," &c, if, indeed, all such expressions had not been discarded and overruled in the case of *Jesson v. Wright*, 2 Bligh 1, and treated as "petty distinctions," wholly insufficient to change the meaning of the word "heirs." Jarm. 337, (2 vol.) says, "it would be idle to attempt to distinguish *Barkhouse v. Wells*, 1 Equ. Cas. Abr. 184, pl. 27, from *Roc v. Grew*, 2 Wils. 322, on the ground of the words "only," "without impeachment of waste," &c. They merely show the testator meant to confer an estate for life and nothing more, which sufficiently appeared from the express limitation for life. See the remarks of the same author at p. 246, also *Robinson v. Robinson*, 1 Burr. R. 38, 2 Ves. sen. 225. The words "equally divided," superadded to the limitation to "heirs," whatever force they might have had at one time, or may now have in England, can have little or no force in this country. The importance attached to them in England was because they indicated a manner of taking inconsistent with the devolution of an estate tail (or an estate in fee in many cases,) growing out of their law of primogeniture, which does not exist here.

Here our laws require an equal division among heirs in equal degree, and a declaration to that effect by a testator is inconsistent with the manner of taking as "heirs."

If the conclusion is right that Caroline Brooks took an estate tail in the land, it is unnecessary to say much in regard to the interest she took in the slaves.

It follows necessarily that she took the absolute interest in the personal property. The words "heirs lawfully begotten," used in the will of Josiah Robertson, being some restriction upon heirs generally, have been decided to pass an estate tail in lands. *Nanfan v. Legh*, 2 Marsh. 107, Co. Litt, 20 b, Hargrave's note 2. The general rule that where the words would give an estate tail when applied to real estate, they will give the absolute interest when applied to personal property, will not perhaps be questioned. Indeed, the questions seem to be regarded in England as identical. 2 Jarm. on Wills, ch. 44, and the cases there referred to. *Browncker v. Bagot*, 19 Vesey 574.

ALLEN, P. This case brings again before the court the question, so often discussed here and in England, as to the operation of the rule in *Shelley's Case*, that where an estate of freehold is limited to a person, and the same instrument contains a limitation, mediate or immediate, to the heirs of his body, or to his heirs, the ancestor takes the whole estate comprised in the terms, either as a fee tail or a fee simple. In this case there is no limitation over on the failure of issue; and the only question arising on the will is, whether the testator, in reference to the devise or bequest to his daughters Mary Murphy and Caroline Brooks, used the words "heirs lawfully begotten" in their legal, primary and proper sense, or whether he used them as descriptive of some other class of objects. In the view I take of this case, the interpretation of the will

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is not effected by the character of the property. If, as applied to real estate, the clause would have created an estate tail in the daughters, in such case the full and entire interest in personalty would pass to the legatee: as an estate tail in personal property gives the absolute dominion.

When a testator uses a term having a well known legal meaning, he is to be understood as having used it in that sense, unless the context shows that he used it in a different sense. Unless that is apparent, the rule is inflexible; and though the testator may have supposed that the first taker would take an estate for life only, and perhaps so intended as then advised, yet it does not follow if he had been aware of all the consequences of a change in the term used, that he would have made it. The will bequeaths the property to his daughters, to be held by them during their natural lives and no longer, and then to be equally divided between their heirs lawfully begotten. If the words "during their natural lives and no longer," and "then equally divided between their heirs," are to be construed as modifying the words "heirs lawfully begotten," and as describing another class, and to imply children, who were to take as purchasers, then if the daughters had died leaving grandchildren, they would have been excluded. But giving the term heirs its legal and proper sense, all the descendants of the daughters would be embraced. So that it is at least conjectural, if we are to look to intention alone, in what sense the testator meant to use the term. It therefore would seem that the better plan is to give such words their plain, legal effect, and to reject mere loose expressions, from which to infer an intention that they were used as descriptive of a different class of objects.

The words here relied on as modifying the words "heirs lawfully begotten," do not indicate such inten-

tion so clearly as to justify the conclusion contended for. "During their natural lives and no longer," is no more than to show what appears in all these cases, that he meant to confer an estate for life; and it is to this class of cases that the rule in *Shelley's Case* applies: and the words "equally divided between their heirs," are, as it seems to me, entitled to but little weight in fixing up the word "heirs" the meaning contended for. In England they were entitled to more consideration, as indicating an intent that the estate should not pass according to the law of decents. With us, where estates tail are converted into estates in fee simple, and the doctrine of primogeniture is abolished, and the general sentiment is in favor of an equal division amongst those standing in the same relation, the inference would be that the testator, by the use of these words, intended that they should take as heirs rather than in any other character. But upon this question the authorities are numerous both in England and in Virginia; and they have been conflicting and inconsistent. It is conceded in the argument, and the cases show, that such expressions as "share and share alike," or "as tenants in common," &c. have controlled the word "heirs." The whole question was elaborately discussed and carefully considered in the case of *Jesson v. Wright*, 2 Bligh's P. R. 1, upon appeal to the house of lords.

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The devise was to W for life, and after his decease, to the heirs of his body, in such shares and proportions as W by deed, &c. should appoint; and for want of such appointment, to the heirs of the body of W, "share and share alike as tenants in common." And if but one "child," the whole to such only child; and for want of such issue, to the devisor. The court held that an estate tail vested in W by this devise, reversing the decision in King's bench, and overruling all that class of cases which had given to such words the

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effect of modifying and controlling the meaning of the technical word "heirs." Lord Redesdale said, "That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise."—"It has been argued that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that the heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways he desired, and the words of modification are to be rejected."

Several cases have occurred since the case of *Jesson v. Wright*; and though in some instances the principle of that case may not have been followed out, yet the weight of authority is in favor of the rule there enounced. The cases on this subject are reviewed in 2 Jarm. on Wills 271, ch. 37; and he concludes that the doctrine of *Jesson v. Wright* has prevailed, and stands on the soundest principles of construction. Hayes on Estates Tail 100, 7 Law Libr. 54, sustains the same proposition. See also to the same effect Powell on Devises 464, ch. 23, 22 Law Libr. 245.

The words in the will under consideration are not so strong as in the case referred to. There the heirs of the body could not take as tenants in common, and the court was compelled to reject the words of modification. In this case the words of modification are not inconsistent with the operative words of the bequest or devise, because the property passing by descent to the heirs, would be equally divided if they all stood in the same degree of relationship.

It is contended, however, that this is no longer an open question in Virginia; and that the precise ques-

tion has been adjudged in at least one case, and the principle affirmed in others. *Bradley v. Mosby*, 3 Call 44, is relied on as having in effect settled the principle that the word "heirs" should, in a will like this, be treated as descriptive of another class, the children of the first taker. In that case there was a limitation by deed of slaves to the donor's daughter for life, and after her death to the heirs of her body, to the only proper use and behoof of such heirs, "their executors, administrators and assigns." The court, consisting of Judges Pendleton, Lyons and Roane, was divided; each judge giving a different construction to the will. Pendleton founded his opinion upon the supposed distinction between words which create an express estate tail, and such as create an estate tail in lands by implication and construction, to favor the intention to provide for the issue; and maintained that the latter ought not to be applied to personals to defeat the intention. But the rule in question is not confined to cases in which the words, if applied to real estate, would create an express estate tail; it applies also to cases in which an estate tail would arise by implication, with the exception of those cases in which words expressive of a failure of issue are in gifts of personal but not of real estate, confined to issue living at the death; questions depending not so much upon the sense in which the word "heirs" has been used by the donor, as upon the fact whether the limitation over is too remote. Powell on Devises 632, (mar.) 22 Law Lib. 338; 2 Jarm. on Wills, 489, ch. 44. In the case of *Lampley v. Blower*, 3 Atk. R., 396, referred to by Judge Pendleton, Lord Hardwicke said, that a gift to A and her issue would vest the whole interest in A if it had stopped there; but held that the bequest over, in case either of the legatees died without leaving issue, which in regard to personality, in legal construction means issue living at the death, explained issue in the body

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1855. of the devise to be used in the same sense. Judge January Roane rested his opinion exclusively upon the words Term.

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Brooks. giving the property to the heirs of the first taker, to the only proper use of such heirs, their *executors, administrators or assigns*, as showing "there was no eye of entail;" for it could not go from one heir of the body and his executors and administrators to another heir and his executors and administrators; for which he cites *Hodgeson v. Bussey*, 2 Atk. R. 89; *Theebridge v. Kilbourne*, 2 Ves. R. 233, which in a great measure turned upon the import of those words. Lyons, judge, held that the words would have given an estate tail in lands, and therefore they gave the absolute property in slaves. The case therefore decided no principle applicable to the will now under consideration; and the opinions of Judges Roane and Pendleton were founded, the first upon expressions not found in this will, and the last upon the idea of a distinction between cases in which the words when used in reference to realty would create an express estate tail, and those in which an estate tail would be created by implication: a distinction it appears that does not exist except in certain cases where words expressive of issue receive a different construction as applied to real and personal estate; as in the case of the phrase "*leaving no issue;*" in respect to which it has been held that it means an indefinite failure of issue where real estate is the subject, but in reference to personal estate, it means a failure of issue at the death. *Forth v. Chapman*, 1 P. Wms. 663.

Warners v. Mason & wife, 5 Munf. 242, turned upon the question whether the limitation over was too remote. The testator devised land to his son during his natural life, and then to his heirs lawfully begotten of his body, "that is, born at the time of his death or nine calendar months thereafter;" and for want of such heirs, then to his nephews, one to set a price and

give or receive such price from the other: This was held to be a good limitation over. No opinion was given by the court, but it is manifest the court held that the testator looked to the period of the death of his son, and not to an indefinite failure of issue, because he speaks of heirs born at the son's death; and the remainder was to persons in being who were the objects of his bounty. These superadded words to the words "heirs lawfully begotten," demonstrating that the testator did not contemplate an indefinite failure of issue.

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Pryor v. Duncan, 6 Gratt. 27, was decided upon the ground, that although the works "heirs lawfully begotten," were used in one clause, the whole context showed that the words were not used in their legal and primary sense, but were descriptive of another class of persons fully pointed out in a following clause, as the children of the first taker. He lent the slaves to his daughter during her natural life, and to her heirs, &c. Her interest was to cease, and his executors to take possession, if she concealed or attempted to alienate the slaves; in such case, after her decease they and their increase to be divided among her "children," if any living; otherwise to be divided among the testator's children, (naming them,) and their heirs. Thus showing, from the indifferent use of the words "heirs" and "children," by the restricted power over the property, and by the bequest over if no "children" living at her death, that he used the words "heirs lawfully begotten" in the sense of "children."

The last case to which the counsel of the appellant referred is the case of *Self v. Tune*, 6 Munf: 470. By deed slaves were given to a daughter of the donor and her husband, for and during their natural lives; and after the decease of both, the slaves and their increase "to be *equally* divided among the heirs of her body;" and in default of such heirs, to return and be equally

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divided between the donor's son and other daughter, and their heirs. The court, in the brief opinion pronounced by Judge Roane, says, "If these words 'heirs of her body' had stood alone in the limitation after the death of the daughter and her husband, her title would have been absolute; as in that case they would have been words of limitation: But the addition of the words 'equally to be divided between them,' compelled the court to construe them as words of purchase, and as a description of the persons who were to take."

The cases of *Wilson v. Vansittart*, Amb. R. 562; *Doe ex dem. Long v. Laming*, 2 Burr. R. 1100, and cases of that description, where words of that and the like character were held to modify the words "heirs of the body," were overruled by *Jesson v. Wright*, and the cases which have followed it. Powell on Devises 466, 22 Law Libr. 249; 2 Jarm. on Wills 286, ch. 37; where all the cases are collated.

The case of *Self v. Tune* forms one of a series decided about the same time upon the construction of the rule in *Shelley's Case*, and what would amount to a good limitation over. These are the cases of *Timberlake v. Grates*, 6 Munf. 174; *Gresham v. Gresham*, Id. 187; *James v. Mc Williams*, Id. 301; *Cordle's adm'r v. Cordle*, Id. 456; and *Didlake v. Hooper*, Gilm. 184. The authority of these last cases has been shaken, if not overthrown, by the subsequent cases of *Bells v. Gillespie*, 5 Rand. 273; *Broaddus v. Turner*, Id. 308; *Griffith v. Thompson*, 1 Leigh 321; *Callava v. Pope*, 3 Leigh 103; *Deane v. Hansford*, 9 Leigh 253; *Nowlin v. Winfree*, 8 Gratt. 346. Which latter cases have, it is believed, been more in conformity with the English cases and the earlier cases in this court. The precise question decided in *Self v. Tune* did not arise in any of the latter cases; though the general principles on which the latter cases proceed may not be precisely in conformity with the doctrine of that case.

In *Deane v. Hansford*, 9 Leigh 253, Judges Parker and Brockenbrough observed, that as *Timberlake v. Graves* was followed in quick succession by the other cases named, they should be considered as settling the law in cases exactly resembling them; more especially as in devises made since the act of 1819 took effect, the statutory rule will prevail. But Brockenbrough said that if *Timberlake v. Graves* stood alone, he would have concurred in overruling it. In conformity with this suggestion, perhaps if *Selby v. Tunc* stood alone, it should be recognized as ruling a case exactly resembling it, although it might be considered as having been erroneously decided. But besides being in some degree shaken by the general doctrines advanced in the later cases, the principle of the case is, as it seems to me, in conflict with the two cases of *Goodwin v. Taylor*, 2 Wash. 74, and *Wilkins v. Taylor*, 5 Call 150. The testator, in the first case, gave to his daughter the interest of a sum of money for life; at her death he gave the interest one-fourth to each of his grand children, and at their decease, the principal and interest to be disposed of by them to their heirs, "in such proportions" as they by their wills respectively may direct: and in case of the death of Sarah (one of said grand children) without issue, her part was bequeathed over. There is not an express gift to the grand children for life, but the interest alone was given to them, with the power to dispose by will: and in regard to Sarah, there was a gift over if she died without issue. The will gave power to dispose of the subject to their heirs in such proportions as they by their wills may direct. The court held that the grand children took the whole estate. In the case of *Wilkins v. Taylor*, which arose on the same will, in reference to the share of Sarah, it was held to be a limitation after an indefinite failure of issue, and void. The power to dispose of the principal to their heirs

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in such proportions as they by their wills might direct, tends more strongly to indicate that the testator intended that the heirs should not take in the regular course of descent, than the words "equally to be divided" in the present will. On the contrary, the words "equally to be divided" would, under our law, rather indicate that they should take as heirs. I do not think that the will in this case shows that the testator used the words "heirs lawfully begotten," in any other than their ordinary sense. That he designed "children" by the use of these words, is entirely conjectural; and under a certain state of facts, such a construction would have been more likely to violate than to subserve the intention of the testator. I also think that the authorities in this court are not in harmony with each other, and that it would be more in conformity with the spirit of the later as well as of the earlier cases in this court, and the true doctrine in regard to the rule in question, to hold that the superadded expressions do not indicate clearly an intention to use the term as descriptive of any other class than the heirs. I think therefore that the decree should be affirmed.

MONTGOMERY and LEE, Js. concurred in the opinion of ALLEN, J.

DANIEL and SAMUELS, Js. dissented.

DECREE AFFIRMED.

Richmond.HARVEY & *al.* v. EPES.1855.
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February 28.

1. Contractors on a railroad hire slaves for a year to work on the road in the county of A. They take them to the county of C, and employ them on the road in that county; and whilst there they take sick and die. **HELD:**

1. This removal of the slaves from the county of A, and working them in the county of C, is not of itself a conversion of the slaves to their own use by the contractors, whereby they became immediately responsible to the owner for the value of the slaves in the event of their death, whether occasioned by such wrongful act or not.
 2. But if the death of the slaves was occasioned by the wrongful act of removing them and working them in the county of C, then the said act, in connection with the death of the slaves, was a conversion of them by the contractors to their own use, and made them liable for the value of the slaves, either in case or trover: And the slaves having died whilst they were employed in C, the burden of showing that their death was not occasioned thereby, devolves upon the contractors.
 3. Whether the removal of the slaves to the county of C was or was not a conversion, depending upon whether or not it occasioned their death, the implied waiver of the owner of the slaves, of the obligation by the contractors to work them in the county of A, cannot be inferred from facts which transpired before the death of the slaves.
 4. The acceptance by the owner of the slaves of the hires up to the time of their death, having been after the institution of the action to recover their value, and whilst the said action was vigorously prosecuted, was not a waiver in law of the conversion.
2. Several instructions are given to the jury, in the last of which a fact is assumed which was properly for the determination of the jury. The previous instructions, however, had submitted that fact to the consideration of the jury, so that there could be no doubt on their minds as to the meaning of the court in the last instruction. The law having been correctly stated, judgment will not be reversed.

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3. Parol evidence having been introduced on a trial, some of which is legal and other parts illegal, it would be improper for the court to instruct the jury, in general terms, to disregard all parol evidence tending to alter, vary, explain or add to, the written contracts between the parties introduced in evidence. Nor is the court bound to point out to the jury such of the evidence as would thus affect the contracts; but this is to be done by the party asking for the instruction.

This was an action on the case in the Circuit court of Amelia county, by Frances Epes against Robert Harvey and James Hunter, partners, and contractors on the Richmond and Danville railroad. The declaration contained two counts.

The first counts set out that on a certain day in 1849, the defendants hired of the plaintiff until the 25th of December 1849 then next ensuing, two negro men slaves, the property of the plaintiff, to be worked and employed by the said defendants upon such part only of the Richmond and Danville railroad as might be located in the county of Amelia. Which said slaves were accordingly put into the possession of the defendants for the purpose aforesaid; and the defendants were bound to use and employ said slaves upon such part only of the said railroad as lies wholly in the county of Amelia; and not to use and employ said slaves in any other county upon the line of the said railroad. Yet the defendants, well knowing the premises but disregarding, &c. on the day of 1849 carried the said slaves to the county of Chesterfield, and out of the county of Amelia, and used and employed them as laborers on the line of said railroad without the county of Amelia, and within the county of Chesterfield. And that they continued to use and employ the said slaves on the said railroad in the county of Chesterfield until they sickened and died. The second count was in trover for the conversion of the said slaves to the defendants' use.

There was a demurrer to the first count of the declaration; which was overruled. The defendants then

pleaded "not guilty;" and, that the plaintiff agreed and consented subsequent to the contract for hire, that the said slaves might be taken to the county of Chesterfield, and used and employed on the said railroad: And issues were made up on these pleas.

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On the first trial of the cause the jury could not agree, and were discharged. On the second trial the defendants filed two bills of exception to opinions of the court given upon the trial. The first bill of exceptions was as follows:

Be it remembered, that upon the trial of this cause, the plaintiff, to sustain the issues on her part, introduced Archer Jones, a witness, whose testimony tended to prove, that in the early part of the year 1849, she hired three slaves to the agent of the defendants, to be worked on the Richmond and Danville railroad, with the express agreement that they were to be worked only in the county of Amelia, and were to be attended by Dr. Cheatham, a physician residing in said county. That as she did not know the defendants, it was agreed that the agent of the defendant, John T. Foster, (who made the contract,) should execute his bond for the hires, with his father as security. That his sister, the plaintiff, did not hear, until after the Easter holiday, in the latter part of March of that year, that the slaves were in Chesterfield; and he, at her instance, wrote to Foster, complaining of it; and complained, on several other occasions, but at what time he does not recollect. He did not recollect whether he made such complaint after the 10th May. He might have done so, but could not say that he had. He received the bond, dated the 13th January, some time after the contract, when, he could not say with accuracy, and carried it to his sister, Mrs. Epes, who said she would not receive it, as by the contract, she was to have the Fosters' bond, and that she did not know the contractors. That the first time he saw J. T. Foster, the

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agent of the defendants, after he received said bond, he told him that his sister would not have the first bond, and he said he would give another bond, if Jones would let the slaves work in Chesterfield county. That he told him he would consult E. G. Booth, a brother in law of his sister, on the subject. That he did see and consult him, and soon after saw said Foster, and refused to agree that they should be so worked; and that when witness read the endorsement on the first bond, bearing date 9th May 1849, he refused positively to agree to the same. That neither he nor his sister would have accepted the guarantee of J. T. Foster, but desired the security of J. W. Foster's name, who was the father of said J. T. Foster. That the said J. T. Foster told him to keep the said bond, and meet him next day at Dennisville, the residence of his father, and he would fix the matter to his satisfaction; and also promised that the slaves should be removed on the next Monday to the county of Amelia. That he met the said Foster the next day, as agreed, and received the bond, signed by J. T. Foster and J. W. Foster, and dated 10th May 1849, as follows:

On or before the first day of January next, we, John T. Foster and John W. Foster, promise and oblige ourselves, &c. to pay to Mrs. Frances Epes the sum of two hundred dollars, for the hire of three negro slaves, named Lewis, Oliver and Alfred, to work on the Richmond and Danville railroad, for the present year. Said slaves to be returned at Christmas next, well clothed with the customary clothing, and furnished with a hat and blanket, subject however to the deduction of any extra clothing charged by the contractors, and also the doctor's bill, at three dollars each.

Given under our hands and seals this 10th day of May 1849.

JOHN T. FOSTER. (*Seal.*)
JOHN W. FOSTER. (*Seal.*)

And signed the assignment on the bond of the 13th of January 1849, which assignment bears date 10th May 1852.

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Bond, Assignment, &c.

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On or before the first day of January next, we, Robert Harvey, James Hunter, H. L. Brooke and W. Goddin, promise and oblige ourselves and our heirs to pay to Mrs. Frances Epes the sum of two hundred dollars, for the hire of three negro slaves named Lewis, Oliver and Alfred. Said slaves to be returned at Christmas next, well clothed with the customary clothing, and furnished with a hat and blanket.

As witness our hands and seals this 13th day of January 1849.

ROBT. HARVEY. (*Seal.*)

JAMES HUNTER. (*Seal.*)

HENRY L. BROOKE. (*Seal.*)

W. GODDIN. (*Seal.*)

Endorsement.

AMELIA C. H. May 9, 1849.

I am hereby bound to Mrs. Frances Epes, for the payment of one hundred and ninety-one dollars of the within bond, after within subscribers being sued to insolvency—the said Foster having the privilege to work the hands in Chesterfield county.

J. T. FOSTER.

I assign the within bond to J. T. & J. W. Foster, for value received, without recourse.

ARCHER JONES,

May 10, 1849. For Frances Epes.

That he was never authorized to agree that the slaves should be carried out of Amelia, and never agreed that they should. That he knew his sister

1855. was opposed to it, and would not have agreed that they should be. That two of said slaves died during the year, while at work in Chesterfield—the same for which this suit is brought—one a very likely man, about thirty-five years old, and the other a likely boy, about eighteen. After he received the bond of the 16th of May 1849, he informed his sister of it, and she said it was satisfactory.

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And the plaintiff introduced another witness, Matthew Bland, whose testimony tended to prove that he was at Mrs. Epes' when Foster and Jones came there, and heard the contract made between Mrs. Epes and Foster, for the hire of the slaves. That it was agreed that the slaves should be worked in Amelia county, and that Mrs. Epes refused to give Mr. Foster permission to have them worked in Chesterfield. That after the contract was made, but in the course of the same conversation, he heard Foster say that they were about to build or were building shanties in the county of Amelia. That the contract was made with Mrs. Epes herself by the said Foster. That some time afterwards, he received a letter from Mr. Jones to T. W. and J. T. Foster, about the slaves working in Chesterfield, and thinks he sent it to said Foster, but by whom he did not recollect.

The defendants then introduced the testimony of J. T. Foster, which tended to prove that he was employed by the defendants in January 1849, to hire negroes for them, to work on the Richmond and Danville railroad. That the defendant told him the hirelings would be worked a portion of the time in the county of Amelia. That hearing from Mr. Booth, a brother in law of the plaintiff, that Mr. Jones, her brother, had some slaves to hire out for her, he went to his house in Nottoway county, and from his house both went over to plaintiff's house in same county, and but three miles from said Jones'. There he saw the slaves,

and hired them from Jones, who acted for his sister. That the plaintiff expressed a wish that the slaves would be worked only in Amelia, and he replied they would be worked a portion of the time in Amelia. Witness denied that he agreed to work them only in Amelia. Shortly after, he took possession of the slaves and carried them to Chesterfield, and put them on the line to work where the other hands were working on the railroad, and sent the plaintiff the bond of the 13th January 1849. That the contract of hiring was made with Mr. Jones, and not with Mrs. Epes. That on the 9th of May, he met with said Jones at Amelia court, who told him his sister, the plaintiff, was not satisfied with the bond, as she knew nothing of the parties, and desired other security. He complained also of the negroes being kept at work in Chesterfield. The witness then said, to satisfy Mrs. Epes, he would become the security, upon certain conditions. That he and Jones stepped into Mr. Eggleston's store. He wrote on the back of the bond of the 13th January, the endorsement of the 9th of May, read it to Jones and handed it back to him, who took it and seemed to be satisfied. The next day the said Jones came to Dennisville, where he lived, and said his sister would be better satisfied with a bond executed by J. T. Foster and his father, and asked Mr. J. W. Foster to join his son in a new bond, who consented. The bond of the 10th May was then executed, and handed to said Jones, who thereupon, as agreed, assigned the first bond to said J. T. and J. W. Foster, and before this suit was brought. That on the 16th day of January 1850, he received of the defendants the hires for the slaves, as per statement endorsed upon the bond of the 13th January 1849, which amount was paid over by his father to E. G. Booth, the agent of the plaintiff, and one of her counsel in this suit, since the institution of this suit and since the trial had in October 1851.

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And the defendant then introduced John W. Foster, who stated, that on the 10th day of May 1849, the bond of that date was delivered to Archer Jones, the witness, having been first read to him. That said Jones asked him to join his son in said bond, remarking that his sister was a woman, and you know very particular. That his son, John T. Foster, had requested him, the evening before, as he returned from Amelia court, to join him in said bond to Mrs. Epes, and he had consented to do so. That on that occasion, nothing was said about where the slaves were to be worked, or about restricting their being worked in any particular place, except what appears on the face of the bond of the 10th May 1849.

Further testimony in the cause tended to prove, that the work on the line of the railroad had not progressed so far as Amelia county; and Robert T. Brooke, a witness for the defendants, stated that he was the general agent of the defendants, in Richmond, to keep their books, give bonds for hires, and manage their general concerns. That he filled up the bond of the 13th January 1849. That as far as he knew, no authority was ever given to the agents for hiring, to hire slaves to be worked in Amelia. That some had been so hired, but none of the hirings so made were confirmed, but of two slaves, and they were sawyers.

The defendants further introduced the following agreed statement:

The plaintiff by her attorney admits that the following facts were proved in this case by Dr. William B. Ball, namely, that the neighborhood of the places in the county of Chesterfield, where the slaves mentioned in the declaration, died, is a healthy neighborhood, and as healthy as the adjoining counties. That the said slaves were attended by the witness, and received all necessary and proper attention. That they died of pneumonia, a disease which was very prevalent at the

time throughout the county; and that all necessary
and proper comforts were provided for the said slaves.

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And the plaintiff then recalled the witness Jones,
who stated that he had never agreed, as the witness
Foster had testified, that the slaves should be carried
to Chesterfield, but, on the contrary, expressly refused.
That his sister, and not he, made the contract with
Foster.

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And thereupon, the defendants, by their counsel,
moved the court to give the jury the following in-
structions, namely:

1. If the jury shall believe, from the evidence, that
there was no special contract that the slaves hired from
the plaintiff should be worked alone in the county of
Amelia, the defendants are not responsible for the loss
of the said slaves, by reason, simply, that they worked
in Chesterfield county.

2. If the jury believe, from the evidence, that there
was a special contract between the plaintiff and de-
fendants, that the slaves, which are the subject of
controversy, were hired to the defendants, to be worked
by them on the Richmond and Danville railroad in
the county of Amelia, and that the said slaves were
worked by the defendants on the said Richmond and
Danville railroad in the county of Chesterfield, but
were not thereby subjected to any greater labor, nor
exposed to any greater risk whatever than if the said
slaves had been worked in the said county of Amelia;
and that while so worked in the said county of Ches-
terfield the said slaves sickened and died, but not in
consequence of being so worked in the said county of
Chesterfield, nor in consequence of any neglect or
want of due care and attention on the part of the de-
fendants, then the jury should find no damages by rea-
son of such sickness and death of the said slaves.

Which instruction the court refused to give, but
instructed the jury, that if they should believe from

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the evidence, that there was a special contract between the plaintiff and the defendants, that the slaves, which are the subject of controversy, were hired by the plaintiff to the defendants, with an express stipulation and agreement, that they were to be employed by them on that part of the Richmond and Danville railroad, which runs through the county of Amelia only, and that they were not to be worked on said road out of said county, and that the defendants did carry them beyond the limits of said county of Amelia into the county of Chesterfield, and there worked them on said road, that such carrying them beyond the limits of the county of Amelia, and working them in the county of Chesterfield, was, of itself, a violation of their contract, and a conversion of the said slaves to their use, by reason of which they became immediately responsible to the plaintiff for the value of said slaves, in the event of their death.

3. If the jury believe, from the evidence, that there was a special contract of hire between the plaintiff and defendants, that the slaves, which were the subject of controversy, should be worked on the Richmond and Danville railroad in the county of Amelia, and the said slaves were worked on the said railroad in the county of Chesterfield, where they sickened and died, yet the plaintiff cannot recover under the first count in her declaration in this case, unless the plaintiff shall also prove, to the satisfaction of the jury, that such sickness and death of the said slaves was occasioned by their being worked in the county of Chesterfield, or by the carelessness, negligence or ill usage of the defendants.

4. If the jury believe, from the evidence, that there was a special contract of hire between the plaintiff and the defendants, whereby the defendants were required to work the slaves, which are the subject of controversy in this case, in the county of Amelia;

that after the making of such contract, the said slaves were worked in the adjoining county of Chesterfield, where they sickened and died, and that the plaintiff, by her agent, after she was informed that the said slaves were working in the said county of Chesterfield, and before they died, took from third persons a new bond for the hires of the said slaves, without their regarding or stipulating that the said slaves should be worked only in the said county of Amelia, and assigned to such third person, without recourse against her, the bond which had been taken of the defendants for such hire, and which was paid by the defendants to her assignees before the institution of this action, (and which new bond expressed that the said slaves might be employed on the said railroad without restriction as to the county in which they were to be emloyed, and was accepted and retained by the plaintiff until after the deaths of the said slaves, and until the institution of this suit), such acts of the plaintiff amounted to a waiver of the second count in her declaration in this case, no other act of conversion being proved than the working of the said slaves in the said county of Chesterfield.

Which instruction the court refused to give; but in the place thereof, gave the following instrnction:

If the jury should believe, from the evidence in the cause, that the witness, Archer Jones, acted as the agent of the plaintiff, and changed the original contract in such a way as to permit the defendants to work said slaves out of the county of Amelia, and within the county of Chesterfield, and took the new bond, executed by John T. Foster and John W. Foster, in pursuance of the change of the original contract, and in substitution thereof, then the defendants had a right to work the said slaves on the line of the Richmond and Danville railroad, although it might be out of the county of Amelia.

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1855. But on the other hand, if the jury should believe,
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original contract, then the plaintiff has a right to re-
cover in this action—and that the fact that Mrs. Epes,
Harvey & al. by herself or her agent, received and held the bond of
v. Epes. John T. and John W. Foster for the hire of said slaves,
does not of itself prevent her from relying upon the
original contract of hire between herself and the
defendants.

5. If the jury believe, from the evidence, that there
was a special verbal contract, that the slaves in the
declaration mentioned should not be worked out of the
county of Amelia, and that after she knew of their
being put to work in the county of Chesterfield, the
plaintiff received the bond of J. T. and J. W. Foster,
dated 10th May 1849, as security for their hires, that
such acceptance of the bond was in law a waiver of the
conversion consequent upon the working of the slaves
out of Amelia county, previous to that time.

6. If the jury believe, from the evidence, that the
plaintiff has received hires for the said slaves up to the
period of their deaths, such reception of payment for
hires amounts in law to a waiver of the conversion,
even though the jury may believe that there was a
special verbal contract that said slaves should not be
worked out of the county of Amelia.

Which two last named instructions the judge re-
fused to give, for the reason that the matters embraced
therein had already been embraced by the former in-
structions, and had already been decided on.

And to the opinions of the court refusing to give
the second instruction as prayed, and giving the in-
struction given in lieu thereof, and refusing to give the
fourth instruction as prayed, and giving the instruction
given in lieu thereof, and refusing to give the fifth and
sixth instructions, the defendants, by their counsel,
excepted.

The defendants then moved to exclude from the jury all parol evidence tending to alter, vary, explain or add to the written contracts between the parties, as evidenced by the bond of the 13th of January 1849, and the endorsements thereon of the 9th and 10th of May, and by the bond of the 10th of May 1849. But the court overruled the motion, and the defendants again excepted, setting out the evidence as in the first exception.

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There was a verdict and judgment for the plaintiff for twelve hundred dollars: And the defendants thereupon applied to this court for a *supersedeas*, which was allowed.

Giles and R. T. Daniel, for the appellants.

John Y. Gholson and James H. Gholson, for the appellee.

MONCURE, J. The first count of the declaration seems to be good, in substance at least if not in form; and I think the demurrer thereto was properly overruled. Indeed there is no complaint of error in the judgment in that respect.

The first and main question in this case arises on the instruction given to the jury in lieu of the second instruction asked for by the plaintiffs in error. Their liability for the value of the slaves in controversy under the first count of the declaration, depends upon whether the death of the slaves was occasioned by any default of the plaintiffs in error, the hirers of the slaves. If it was so occasioned, they are so liable; if it was not, they are not. Upon this subject I presume there can be no doubt; and this appears to have been the opinion of the Circuit court in giving the third instruction asked for by the plaintiffs in error. But that court, in giving the instruction which was given in lieu of the second instruction asked for, seems to

1855. have been also of opinion that if the slaves were hired
January Term. with an agreement that they were to be employed only

Harvey which runs through the county of Amelia, and if the
& al. hirers in violation of the agreement carried the slaves
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county of Chesterfield, and there worked them on said
road; then that such violation was a conversion of the
said slaves to the use of the hirers, and rendered them
liable for the value of the slaves under the second
count of the declaration, (which is a count in trover,)
whether the death of the slaves was occasioned by
such violation or not. I will now proceed to enquire
as to the correctness of this opinion.

To sustain an action of trover, the plaintiff must have a general or special property in the subject of the action, and a right of possession over it at the time of the conversion. *Saund. on Plead.* 869. A man who has delivered goods to a carrier or other mere bailee, and so parted with the actual possession, may maintain trover for a conversion by a stranger; for the owner has still possession in law against a wrong doer; and the carrier or other mere bailee is no more than his servant. *Id.* 873. But where property is bailed for a term, the bailor, having no right of possession, cannot maintain trover against a stranger for converting the property during the term. *Id.* 879. And this is the case though the conversion consist in an absolute sale of the property under an execution against the bailee. *Gordon v. Harper,* 7 T. R. 9; *Bradley v. Copley,* 50 Eng. C. L. R. 685. A bailee for a term, as for instance a hirer of a slave for a year, has an estate in the property during the term, and that estate must be determined before an action of trover can be brought against him in regard to the property. If the action be brought against him for an act done during the term, such act, to sustain the

action, must have the double effect of putting an end to the bailment, and converting the property. It is not every violation of the contract by the bailee which will have that effect. A mere nonfeasance will not have it. Nor, it seems, will any misuser or abuse of the thing bailed in the particular use for which the bailment was made. *Swift v. Moseley*, 10 Verm. R. 208. But there are some acts which, being done by the bailee, will have that effect. The willful destruction by him of the thing bailed will have it. So also if the bailee use the thing for a purpose or in a manner not authorized by the terms of the bailment, and such misuser be the cause or occasion of its loss, he will be liable in trover for its value. Such was the decision of this court in *Spencer v. Pilcher*, 8 Leigh 565. There the slave was hired in the county of Wood for agricultural purposes. In violation of the contract, he was carried by the hirer on a dangerous voyage, in the course of which he was drowned; and the hirer was held to be liable in trover for his value. But such liability was expressly put upon the ground that the loss of the slave was occasioned by the violation of the contract, and not upon the ground that such violation would have made the hirer liable for the loss, whether so occasioned or not. The instruction of the court below, which was sustained in that case, was, "that if the jury are satisfied from the evidence that sending the slave on the voyage was a manifest abuse of the right temporarily acquired by the hiring, and that he was lost to the plaintiff *in consequence thereof*, such abuse is equivalent to a wrongful or injurious conversion, and may sustain the count for trover."

It has been decided in England, in several cases, that an absolute sale of property by the hirer during the term of the hiring, is such an act of conversion as makes him liable in trover for its value. *Loeschman*

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1855. v. *Machin*, 3 Eng. C. L. R. 359, decided by Abbott, C. J. at *nisi prius* in 1818, is the leading case of that class. It was followed by the Court of common pleas in *Cooper v. Willemott*, 50 Id. 672, decided in 1845. Tindal, C. J. was of opinion that the bailment in *Loeschman v. Machin*, was determined by the demand. But supposing it not to have been so determined, he said he could not get over the authority of that case, and was not prepared to dispute the position taken therein. It was also followed by the Court of exchequer in *Bryant v. Wardell*, 2 Welsb. Hurls. & Gord. 478, decided in 1848; and in *Fenn v. Bittleston*, 8 Eng. Law & Equ. R. 483, decided in 1851. The doctrine, though recent in its origin, and though its introduction was strenuously resisted, may now be considered as firmly established in England. But it seems to rest on the ground that a sale of property by a bailee is equivalent to its destruction, so far as his liability is concerned; and so comes within the principle laid down in Co. Lit. 71 a, (3 Thomas' Coke 372,) that if one lends oxen to another to plough his lands, and he kills them, the owner may have trespass or trover at his election; that such a sale operates like a disclaimer of tenancy at common law; that it disables the bailee from returning the property at the end of the term; and though it does not amount to an actual destruction of the property, yet it is so entirely inconsistent with the terms of the bailment that it puts an end to it, causes the possessory right to revert to the bailor, and entitles him to maintain an action of trover. See the judgment of the court delivered by Parke, B. in *Fenn v. Bittleston*, *supra*.

The doctrine of the case of *Loeschman v. Machin* has been followed in some of our sister states, as for instance in New Hampshire, *Sanborn v. Colman*, 6 New Hamp. 14; and Vermont, *Swift v. Mosely*, 10 Verm. R. 208. But it has not been followed in North Carolina.

Andrews v. Shaw, 4 Dev. R. 70; and *Lewis v. Mobley*, 4 Dev. & Bat. 323. In the former case the hirer of a slave for a year sold it; and trover was brought against him by the owner during the year. Ruffin, C. J. said, “*Loeschman v. Machin* is a *nisi prius* decision of C. J. Abbot, and is not satisfactorily reported.”—“If it is meant in that case to say that a bailee upon hire for a determinate period forfeits his interest by abuse to the article, or by a wrongful sale, so that a purchaser from him gets nothing, I think it is not law. I do not know of any such doctrine of forfeiture as applied to personal chattels.” He thought the case came within the principle of *Gordon v. Harper*, and judgment was given for the defendant. In the case of *Lewis v. Mobley*, a tenant for life of a slave sold it absolutely, and after his death the remaindermen brought trover against the purchaser. Gaston, J. in delivering the opinion of the court, said, “To maintain the action it is indispensable that the plaintiff should show a conversion by the defendant of property whereunto the plaintiff, at the time of that conversion, had a present right of possession. It is certain that an action could not have been brought for this alleged conversion during the life of William Kemp, (the tenant for life,) because the right of possession had not then accrued to the ultimate proprietors. *Gordon v. Harper*, 7 T. R. 9; *Andrews v. Shaw*, 4 Dev. R. 70. And it follows as clearly, we think, it could not lie after the death of William Kemp, when the right of possession accrued, because there was no act of conversion thereafter.”

In Virginia the doctrine has not directly come in question, so far as it is applicable to the hire of a slave or other property for a year, or other term. In *Poindexter v. Davis*, 6 Gratt. 481, a tenant for life of a slave had sold it to a person who, believing he had an absolute interest in the slave, removed and sold it out of the state. And the question arose whether the

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1855. tenant for life or the purchaser from him was liable to the forfeiture imposed by the act 1 Rev. Code, ch. 111, § 48, p. 431. The whole court was of opinion that the absolute sale by the life tenant was not void, but valid to the extent of his interest in the slave. Judge Baldwin said, "It passes to the vendee, as effectually as a rightful alienation, the title of the vendor, and none other; and in no wise divests that of the remainderman or reversioner. It was not the design of the legislature to adopt, in regard to slaves, the common law doctrine of forfeiture by wrongful alienation of tenants for life; which sprang from principles of the feudal law, and was applicable only to conveyances of lands by feoffment, fine or recovery, which had the effect of discontinuing the estate of him in remainder or reversion." Id. 497. Judge Allen said, "The bill of sale, though absolute on its face, was not void, because it purports to convey a greater interest than the grantor owned. It operated to vest the grantee with such title as the grantor could part with, and made him the owner of a life estate." Id. 505. In *Philip v. Martiney's ex'or*, 10 Gratt. 333, this court decided that where a tenant for life of a slave sold it absolutely, and after the death of *restui que vie*, the remainderman brought trover against the representative of the tenant, they could not maintain the action, not having had the right to the possession of the slave at the time of the sale. And the case of *Lewis v. Mobley, supra*, was cited and relied on by the court. So far, therefore, as our own decisions go, they tend to show that an absolute sale of personal property by a termor during the term does not work a forfeiture of the term, but is valid to the extent of the vendor's interest; and therefore does not amount to a conversion of the property for which trover can be maintained. There would seem to be no difference in this respect between a hiring for a year and for a term of years, or even for

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life. There may be a difference between a limited interest created by contract and one created in any other way, arising from the privity of contract existing in the former, and not in the latter case. But it is unnecessary to decide the question in this case, (as there was no sale of the slaves in controversy,) and I therefore express no opinion upon it.

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Thus the law seems to stand in regard to the destruction or sale of property by the hirer thereof, during the term of the hiring. No case in England, so far as I am informed, has gone to the extent of deciding that any misuser of property short of its destruction or sale, or at least an attempt to sell it (as in the case of *Loeschman v. Machin*) by a bailee upon hire during the term, will amount to a conversion for which trover will lie. And I am not aware of more than one or two cases in the United States which have gone to that extent; though *dicta* to that effect are to be found in many cases. There are passages in Story on Bailments which tend to support that view, and were much relied on by the counsel for the defendant in error in the argument of this case. Section 413 contains a passage of this kind. The writer is there treating of the hire of things; and after giving several instances in which a thing hired for one purpose cannot be used for another, he uses this general language: "And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor. In short, such misuser is deemed at the common law a conversion of the property for which the hirer is generally held responsible to the letter to the full extent of his loss." The word "generally," which is twice used in this passage, is indefinite; and it does

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not appear what cases, in the writer's view, would fall within the general rule, and what within the exceptions. If he merely intended to say that the hirer is responsible for the loss when it is occasioned by the misuser, though inevitable casualty be the proximate cause of the loss, no fault can be found with the position. *Spencer v. Pilcher* was a case in which, while misuser was the occasion of the loss, inevitable casualty was the proximate cause of it. If the slave in that case had not been wrongfully carried on a dangerous voyage, he would not have been drowned: though having been so carried, there was thereafter no want of due care on the part of the hirer, and the drowning was purely accidental. That kind of inevitable casualty is no excuse to a wrong doer, who cannot apportion his wrong by saying, that the property might have been lost in some other way if it had not been misused. But if the writer intended to say that every such act of misuser by a hirer, whether it be the cause or occasion of the loss of the property or not, is a conversion thereof, and works a forfeiture of his interest therein, I do not think his position is sustained by authority, or by reason. The cases which he cites in support of the passage do not sustain it in this view. Among them are three Massachusetts decisions, which were much relied on in the argument, especially the first of them, viz: *Wheelock v. Wheelwright*, 5 Mass. R. 104; *Homer v. Thwing*, 3 Pick. R. 492; and *Rotch v. Hawes*, 12 Id. 136. *Wheelock v. Wheelwright* was a special action on the case for the value of a horse hired to be rode four and a half miles, and to be returned by 7 o'clock P. M.; but which was rode nine miles, and died at 10 o'clock P. M. in the possession of the hirer. The facts were agreed, and among them, that the defendant did not ride the horse immoderately, or neglect to feed, or cover him properly with clothes. The court was of opinion that the case agreed had ne-

gated the *graramen* alleged in the declaration, and that the plaintiff could not recover in that action. But the court proceeded further to say, "the defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover," &c. This is not a part of the decision of the court. Though I do not mean to say it would have been an erroneous decision, if the action had been trover. The hirer retained and used the horse after the period for which it was hired, as well as for a longer journey; and so was like any other wrong doer having no interest in the property which is the subject of the wrong. *Homer v. Thwing* was an action of trover against an infant for the conversion of a horse, and was similar in its facts to *Wheelock v. Wheelwright*, on the authority of which it was decided. The observations last made in regard to that case apply also to this. *Rotch v. Hawes* was also an action of trover for the conversion of a horse. The action was not sustained, because the owner received payment of hire for the whole distance traveled, and thereby ratified the act of the hirer in going further than the original contract allowed. Though the court took occasion to say, "there can be no question but that the plaintiffs' action would be maintained if they had relied upon the original contract. They might have elected and insisted that the defendant converted the horse by going beyond the journey agreed upon." The observations above made in regard to *Wheelock v. Wheelwright* apply also to this case. It is unnecessary to notice any of the other authorities cited by Story in support of the passage above quoted, as none of them seem to go so far as the three cases on which I have just commented.

In the last edition of his work on bailments, § 413, is followed by § 413 a, b, c and d, which are not in the first edition, and which show that the general rule as laid down in § 413, is by no means settled, and at

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all events is subject to material qualification and exceptions. In § 413 a, he remarks, "But although this is the general rule, a question may arise how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred even if he had not been guilty of any such misconduct, negligence or deviation from duty." And after giving, in that and subsequent sections, various instances in illustration of this remark, he concludes, § 413 d, with this observation: "The question, therefore, in the present state of the authorities, must still be deemed open to controversy. Whenever it is discussed, it will deserve consideration, whether there is or ought to be any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there merely is some negligence or omission, or violation of duty in regard to it, not conduced to or connected with the loss."

I think the doctrine laid down by Story in § 413, receives no support from any thing to be found in Jones on Bailments. There is a passage on p. 121, which, taken by itself, seems to tend that way. "A borrower and a hirer (he says) are answerable *in all events*, if they keep the things borrowed or hired *after the appointed time*, or use them differently from their agreement." But this passage must be taken in connection with what he says elsewhere, and especially at p. 70, where he says, "If the bailee, to use the Roman expression, be *in mora*, that is, if a legal demand have been made by the bailor, he must answer for any casualty that happens *after the demand*, unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or, unless the bailee have legally tendered the thing, and the bailor

have put himself *in mora*, by refusing to accept it: this rule extends of course to every species of bailment." In fact there is nothing said in the work about the action of trover, or any difference between the extent of liability in that form of action, and in a special action on the case or upon the contract of bailment. In the passage above quoted, the writer is referring to a liability which may be enforced in the latter form of action; and the words "all events," and "casualty," contained in those passages, are to be construed as events and casualties occasioned by the wrongful act of the bailee.

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Nor is the doctrine sustained by any of the other authorities cited by the counsel for the appellees. *Duncan v. The South Carolina Railroad Co.* 2 Richardson's R. 613, was an action of covenant. *McLaughlin v. Lomas*, 3 Strohart's Law R. 85, seems to have been a special action on the case, and not trover. *Mullen v. Ensley*, 8 Humph. R. 428, was a suit in chancery. *The Mayor, &c. of Columbus v. Howard*, 6 Georgia R. 213, was an action on the case, and the declaration contained a count in trover. In all these cases the recovery was sustained upon the ground that the death or injury of the slave (which was the subject of controversy therein respectively) resulted from his being used for a different purpose from that intended by the parties, or else that the loss ensued from gross negligence, or other violation of the contract of hiring on the part of the hirers. In most or all of them, the doctrine laid down by Story is repeated, or referred to by the judges or some of them; but it is obvious that none of the cases rest upon that doctrine.

The only case I have seen which seems fully to sustain it is *Horsley v. Branch*, 1 Humph. R. 199, founded on the authority of a former decision of the same court, in *Angus v. Dickerson*, Meigs' R. 459, which I have not seen.

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Upon the whole, I am of opinion that in the case of a bailment upon hire for a certain term, (whatever may be the law in regard to a deposit, a mandate, or other gratuitous bailment, or any bailment during the mere pleasure of the bailor, as to which it is unnecessary to express any opinion,) the use of the property by the hirer during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned; or, at least, unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. Whether, if the act be done with such intent, but do not occasion the destruction of the property, it amounts to a conversion, is a question not necessary to be decided in this case. Without intending to express an opinion upon it, I will consider it as answered affirmatively, for the purposes of this case.

The hirer may be restricted in the use of the property by the terms of the hiring, and will be liable for all damages arising from a violation of his contract, on the same principle, and to the same extent, on which a party to any other contract is liable for its violation. An express provision in the contract that the bailment shall be determined by a violation of any its terms by the bailee, would doubtless be valid. But a bailment upon hire is not conditional in its nature, any more than any other contract; and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms of the bailment.

If any violation of the contract by the hirer, with the exceptions before mentioned, would work a forfeiture of his interest, and be a conversion of the property, it is strange that no case to that effect can be found in any of the English reports. The only case I

have seen in those reports, in which such a doctrine seems to have been contended for, is *Lee v. Atkinson*, decided in 8 Jac. 1, and reported in Yelv. R. 172, and Cro. Jac. 236. There, A hired a horse to B for two days, and to go to a certain place. B was riding the horse to another place, when A attempted to take him away. B brought trespass against A, who pleaded justification. But the plea was not sustained. The reason assigned for the judgment was, that "the plaintiff had a good special property for the two days against all the world; and although the defendant pretends that the plaintiff misbehaved himself in riding to another place than was intended, yet that is to be punished by an action on the case, but not to seize the gelding." It may be said that A had no right to unhorse B by violence, even though the bailment had been determined; and therefore it was unnecessary to decide whether or not it was determined by the wrongful act of B. I refer to the case only as tending to show the opinion of the court on the subject at that early day, and in the only case in which it seems to have come under judicial consideration in England, even incidentally.

The exceptions to the general rules (that for an injury to hired property during the term, trover cannot be maintained by the bailor,) seem to rest upon the ground that the bailment is determined by the voluntary act of the bailee. If he destroys the property, of course he determines the bailment. His duty is to take due care of the property during the term, and return it to the bailor at the expiration thereof. By destroying, he disables himself from returning it. There seems to be no difference, in this respect, between its willful destruction by him, and a destruction arising from his using it in a manner or for a purpose not authorized by the contract. In either case it may be said that the bailment is determined by his volun-

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tary act. If he sells the property absolutely, he also disables himself from returning it, and renders it difficult for the bailor to regain possession at the expiration of the term. If he attempts to sell it, or exercises any other act of absolute ownership over it, his act is so entirely inconsistent with the terms of the bailment, and so subversive of the rights of the bailor, that it may have the effect of determining the bailment. It may operate like a disclaimer of tenancy at common law, and deprive the bailee of the protection of the bailment in an action of trover for the conversion of the property. But if he merely use the property in a manner or for a purpose not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein, such misuser does not determine the bailment, and therefore is not a conversion for which trover will lie. The bailee does not thereby violate any possessory right of the bailor, nor disable himself from delivering the property to the bailor at the end of the term. He is entitled to the exclusive use of it during the term, and intends only to use it during that period. He does not disclaim the title of the bailor. He is not like a wrong doer having no interest in the property, and who is guilty of a conversion if he take or detain it for the use of himself or another; "for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places." Alderson, B. in *Fouldes v. Willoughby*, 8 Mees. & Welsb. 54. In such a case the wrongful act is conclusive evidence of an intention to convert, as a man is presumed to intend the natural and necessary consequence of his act. No such conclusion can be drawn from the mere misuser of property by a hirer during the term. The act of misuser, to be a conversion, must occasion the loss of the pro-

perty, or be done with the actual intent to convert it. A contrary doctrine would be attended with very harsh and unjust consequences. A man hires a slave for a year, to work in one county, and employs it on the first day of the year, in an adjoining county. According to the doctrine in question, he thereby forfeits his interest, and may be immediately sued for the slave, or its value. Or, if he is permitted to retain possession of the slave until the last day of the year, when it dies, he will, according to that doctrine, be liable for the value of the slave, though employed every other day of the year but the first, in strict pursuance of the terms of the contract, and though its death may not have resulted, directly, or indirectly, from any violation of the contract. The same principle would apply to any term of hiring. And if we suppose a case of hiring for a term of years, or for a lifetime, the injustice of the doctrine will be still more apparent. Its injustice, however, is sufficiently apparent in its application to the very common case in Virginia of the hiring of a slave for a year. While such a doctrine would do great injustice to the hirer, it is not necessary for the protection of the rights of the owner of the slave. The parties may make the contract conditional, if they choose, and reserve to the owner the right to resume possession for any violation of its terms by the hirer. In the absence of such a condition, a court of equity would doubtless interpose to protect the rights of the owner, if the safety of his slave were likely to be endangered by a violation of the contract by the hirer. The owner has ample, and often concurrent, remedies to recover any damage he may sustain from any violation of the contract or any breach of duty on the part of the hirer in respect to the slave.

Let us now apply what has been said, to the case under consideration. The hirers in this case did not

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willfully destroy the slaves; nor is it pretended that in employing them in the county of Chesterfield, instead of the county of Amelia, they intended to convert the slaves to their own use, or to injure or impair the reversionary interest of the owner. Then, if such employment of the slaves in Chesterfield instead of Amelia, was a violation of the contract, the liability of the hirers for the value of the slaves by reason of such violation, depends upon whether the death of the slaves was thereby occasioned or not; and is precisely the same under the second as under the first count of the declaration. It makes no difference, in principle, that the slaves died while they were employed in the county of Chesterfield; though it is a very important circumstance for the consideration of the jury in determining whether the death of the slaves was occasioned by the supposed violation of the contract. If the slaves had been employed but a short time in Chesterfield, and then carried to Amelia and employed there until their death, it might have been an easy matter to have determined whether their death resulted from their temporary employment in Chesterfield. But having been employed only in Chesterfield, and died there of pneumonia, it may be very difficult to show that their death would have happened if they had been employed only in Amelia. The burden of satisfying the jury of this fact devolves on the hirers, as the loss happened while their supposed wrongful act was in operation and force, and may have been occasioned by that act. Though difficult, it may not be impossible, to bear this burden. The nature of the disease of which the slaves died; its prevalence in the neighborhood of the place where they would have been employed in Amelia; the proximity of that place to the place of their death; would be material circumstances for the consideration of the jury, and might of themselves, or in connection with

others, satisfy them that the slaves would have died if there had been no such violation of the contract as the instruction supposes. The case, in principle, very much resembles several stated in the sections in Story on Bailments, before referred to; and especially the case of *Davis v. Garrett*, 6 Bing. 716, 19 Eng. C. L. R. 212, referred to in § 413 d, and cited at length in note 5 to that section. That was a special action on the case to recover damages for the loss of a cargo of lime. The plaintiff put the lime on board the defendants' barge to be conveyed from Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire, the whole was lost. The objection taken was that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. Tindal, Ch. J. said, "We think the real answer to the objection is, that no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction, if he could show not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done; but there is no evidence to that extent in the present case."

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I am therefore of opinion, that the Circuit court erred in giving the instruction in question to the jury. It was argued by the counsel of the defendant in error, that the instruction as given was true, as a general

1855. proposition at least; that if there are exceptions to it, January Term. the evidence stated in the bill of exceptions does not show that this case is one; that if it be not one, the plaintiffs in error could not have been injured by the instruction; that it was incumbent on them as the exceptants, to set out in the bill of exceptions sufficient evidence to show that they may have been injured by the instruction; and that therefore the court did not err in giving it. The proposition is not stated in the instructions as a general one merely. Nor could it have been so stated with propriety. The true rule on the subject is not, properly speaking, a general rule subject to exceptions, but is a simple rule to this effect, that if hired property be used by the hirer for a purpose or in a manner not authorized by the terms of the hiring, and the loss of the property be occasioned by such misuser, he is liable in trover for its value.

Harvey & al. v. Epes. It was the province of the jury to determine from the evidence, whether the death of the slaves was occasioned by the supposed violation of the contract or not. There may have been little evidence before them tending to show that the death of the slaves was not so occasioned. It cannot perhaps be said that there was none. The plaintiffs in error may at least have supposed there was enough to entitle them to the instruction which they asked for, and which expounded the law in their view of it. But according to the view which the court took of it, in the instruction given, it was immaterial whether the death of the slaves was occasioned by the supposed violation of the contract or not. That instruction closed the door to the admission of other evidence on the subject, and it would have been vain to have offered it. We cannot therefore presume that there was no other, and that the plaintiffs in error were not injured by the instruction. See *Wiley v. Givens*, 6 Gratt. 277. I think

the court, instead of that instruction and the instructions numbered two and three, moved for by the plaintiffs in error, ought to have given an instruction to the jury to the following effect: "That if there was a special contract between the plaintiff and the defendants, that the slaves which are the subject of controversy were to be employed on that part of the Richmond and Danville railroad which runs through the county of Amelia only; and if the defendants did carry them beyond the limits of said county into the county of Chesterfield, and there employ them on said road; such wrongful act was not, of itself, a conversion of the said slaves to their use. But if the death of the slaves was occasioned by the said wrongful act, then the said act, in connection with the death of the slaves, was a conversion of them by the defendants to their use, and made them liable, under either count of the declaration, for the value of said slaves: And if such death occurred while the said wrongful act, by which it may have been occasioned, was in operation and force, the burden of satisfying the jury that it was not so occasioned, devolves on the defendants."

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I think there is no other error in the judgment. It would have been improper to have given the instructions numbered four and five, because it belonged to the jury to determine from all the evidence, whether the supposed conversion, in the working of the slaves out of Amelia county, was waived or not; and also because, whether that act was a conversion or not, depended upon whether it occasioned the death of the slaves or not; and a waiver of the supposed conversion could not be inferred from facts which transpired, if at all, before the death of the slaves.

It would have been improper to have given instruction number six, because the evidence shows that the amount of hires for the slaves up to the period of their deaths was received by the agent of the defendant in

1855. error since the institution of this suit, and since the
January first trial had therein. The inference of a waiver of
Term. the supposed conversion, which might have been drawn

Harvey from a reception of the amount of hires, had that fact
& al. stood alone, is repelled by the additional fact of the
v. pendency and prosecution of the suit at the time of
Epes. such reception.

The objection made to the instruction given in lieu of number four, is, that it assumes the fact, (of which the determination belonged to the jury,) that by the original contract, the slaves were to be worked only in the county of Amelia. If this instruction had stood alone, the objection made to it might have been valid. But it must be taken in connection with the other instructions; and so taken, there can be no doubt, and could have been none on the minds of the jury, as to the meaning of the court. The question, whether by the original contract the slaves were to be worked only in Amelia, was expressly referred to the decision of the jury in the other instructions at the same time given; and it would have been plainly repugnant to those instructions if the court had told them that such was in fact the original contract. The plaintiff's in error in number four moved for an instruction based upon the assumption of this fact, or the belief of it by the jury. The court declined giving that instruction, but gave one based on the same assumption, *pro hac vice*. The instruction given is to be understood as if after the words "changed the original contract," the words "supposing it to be as stated in instruction number four," had been inserted therein.

In regard to the instruction mentioned in the second bill of exceptions, some of the parol evidence was certainly admissible, and therefore it would have been improper to have excluded all. It would have been just as improper to have instructed the jury in general terms to disregard all parol evidence tending to alter,

vary, explain or add to the written contracts mentioned in the said bill of exceptions. Nor was the court bound to sift the mass of evidence in the case, and determine which would alter, vary, explain or add to the written contracts, and which would not. It was the duty of the parties moving the instruction to point out the particular evidence objected to; and not having done so, the court, on that ground, was justifiable in refusing to give the instruction.

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I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial to be had therein.

DANIEL, J. The main enquiry here has been as to the correctness of the instruction given by the Circuit court in lieu of instruction number two, asked for by the plaintiff in error.

The instruction given has manifest reference to the instruction asked for, and the true meaning of the former appears only on the reading of the two competing propositions together.

The instruction which the court was asked to give was, that if the jury believed, from the evidence, that there was a special contract between the plaintiff and the defendants, that the slaves which are the subject of controversy were hired to the defendants to be worked by them on the Richmond and Danville railroad, in the county of Amelia, and that the said slaves were worked by the defendants on the said Richmond and Danville railroad, in the county of Chesterfield, but were not thereby subjected to any greater labor, nor exposed to any greater risk whatever, than if the said slaves had been worked in the county of Amelia, and that while so worked in the said county of Chesterfield the said slaves sickened and died, but not in consequence of being so worked in the said county of Chesterfield, nor in consequence of any neglect or

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want of due care and attention on the part of the defendants, then the jury should find no damages by reason of such sickness and death of said slaves.

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This instruction the court refused to give; but instructed the jury, that if they should believe, from the evidence, that there was a special contract between the plaintiff and the defendants; that the slaves which are the subject of controversy were hired by the plaintiff to the defendants, with an express stipulation and agreement that they were to be employed on that part of the Richmond and Danville railroad which runs through the county of Amelia only, and that they were not to be worked on said road out of said county, and that the defendants did carry them beyond the limits of said county of Amelia into the county of Chesterfield, and there worked them on said road, that such carrying them beyond the limits of the county of Amelia, and working them in the county of Chesterfield, was of itself a violation of their contract, and a conversion of the said slaves to their use, by reason of which they became immediately responsible to the plaintiff for the value of said slaves, in the event of their death.

It will be seen that the instruction, as given, has no express reference to the time, place or circumstances of the death of the slaves, but in terms rests the responsibility of the defendants, for the value of the slaves, under the supposed breach of contract, on the event of the death of the slaves, generally. But when we see, on looking to the evidence, that it distinctly states the fact that the slaves died during the year for which they were hired, in the county of Chesterfield, whilst there employed in the service of the defendants, and that the instructions asked for are based on the jury's finding that they did so die, there can be no difficulty in understanding the court as meaning to say, that if the jury believed there was such a con-

tract as that supposed in the instructions, and a breach of it by carrying the slaves to Chesterfield, and there working them, followed by the death of the slaves, occurring whilst so at work in Chesterfield, then the plaintiff in the action was entitled to recover of the defendants the value of the slaves.

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Does not the instruction thus understood, propound the law correctly? I think it does. I do not think there can be any doubt of the truth of the proposition stated as a general rule, that where the hirer of property uses it for a purpose or in a manner different from that provided for in the contract of hiring, and the property *is lost in such user*, the hirer is at once answerable for the loss; that the letter to him may treat such *misuser and loss* as a conversion of his property, and have immediate resort to his action of trover, even before the term for which the property was hired, has expired by efflux of time: And that no care or diligence on the part of the hirer to save the property from loss during such illegal use or employment, can be set up as a bar to the recovery of the full value of the property. See Story on Bailment, § 413; *Spencer v. Pilcher*, 8 Leigh 565; *Homer v. Thwing*, 3 Pick. R. 492; *Wheelock v. Wheelwright*, 5 Mass. R. 104; *Rotch v. Hawes*, 12 Pick. R. 136; *Angus v. Dickerson*, 1 Meigs' R. 459; *Mayor, &c. of Columbus v. Howard*, 6 Georgia R. 213; *McLaughlin v. Lomas*, 3 Strobl. R. 85; *De Tollemere v. Fuller*, 1 Const. Court S. Car. 117.

The case last cited is very similar in its features to the one under consideration. In that case the defendant hired sundry slaves; and among them was one, who, by the terms of the contract, was to remain on the farm as a nurse and cook. The defendant sent her to Charleston to attend a sick lady. Whilst there, engaged in that service, she took the small-pox and died. The defendant was warned by plaintiff's agent

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January Term. not send her away. He was held liable for the loss,
— Harvey & al. on two grounds: First, for negligence in not sending
v. Epes. the slave away after being warned of her danger; and
secondly, on the ground, as stated by the court, that
“where property is bailed for a particular purpose, and
it is used for a different purpose, the bailee is liable,
even if it appear that he has used due care and attention,
the legal presumption being that the loss happened in consequence of this misuser.”

It is said, however, that though the rule be as I have stated it, it is nevertheless subject to qualifications and exceptions, which the judge ought to have announced in the instructions.

It is true, that in Story on Bailments, § 413 a, it is said that a question may arise how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred, even if he had not been guilty of any such misconduct, negligence or deviation from duty. As for example, suppose a cargo of lime is put on board of a vessel on freight to be carried from A to B, and the master should unnecessarily deviate from the voyage, and afterwards a storm should arise, and the lime should be wetted, and the vessel should thereby take fire and the whole be lost, according to the general rule, the loss must be borne by the owner of the vessel; for although the tempest might properly in one view be deemed the proximate cause of the loss, yet, according to the doctrine of Pothier, the deviation would be the occasion of the loss; and at the common law, the loss would be held sufficiently proximate to the wrongful act of deviation, and to be properly attributable to it, so as to support an action by the shipper. But suppose the deviation, although voluntary, were for so short a time or under such circumstances as that the vessel must

have been overtaken by the same tempest, and the same accident must have occurred, the question would then arise whether the owner would be liable for the loss.

And in the following section, the author puts another case of goods shipped on board of a ship on freight for the voyage, to be carried under deck, and, by the misconduct of the master, stowed on deck; then he says, if the goods are lost by reason of such wrongful stowage on deck, as by a sea which sweeps the deck, there can be no doubt the owner of the ship is responsible for the loss. But suppose the ship should by inevitable casualty founder at sea in a heavy gale and the whole cargo, under deck as well as on deck, should thus be lost, the loss being in no degree attributable to the stowage, then the question would arise whether the owner of the ship is responsible for the loss.

Upon the supposition that these questions ought to be decided favorably to the ship owner, and that such decision would rule in actions of trover, (about which I do not deem it necessary to express any opinion,) it must be conceded that it would be easy to suppose cases in which the principle might be extended to the relief of a hirer of slaves. As where slaves should be hired to work in a specified branch of the business, in a mine or manufacturing establishment, and they should be put to another service in the same mine or manufacturing establishment, and some casualty should occur involving all, in whatever service there employed, in one common fate, there the rule suggested by the questions of Story (if law) might apply. But could such a rule have any manner of application to a case like the one under consideration?

The views or intimations of Story on the subject are evidently suggested by the remarks of Chief Justice Tindal in the case of *Davis v. Garret*, 6 Bing. R.

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716; 19 Eng. C. L. R. 212; to which he refers. That was the case supposed by Story, of the cargo of lime shipped and lost, during a deviation of the ship, in a storm, by being wetted and setting the ship on fire. The chief justice, after stating the case, and making a partial answer to the objection put, of there being no necessary connection between the wrongful deviation and the loss itself, proceeds: "But we think that the real answer to the objection is, that no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss might have happened, *but that it must have happened* if the act complained of had not been done."

It is obvious, from the very nature of the rule sought to be deduced from this opinion, that it can apply only to a very limited class of cases; and we should have to pass beyond the range of all experience with respect to the nature of disease, even in supposing a case for the defendants, which, consistently with the facts proved, could satisfy the requirements of the rule. It being proved that the slaves died, in the county of Chesterfield, of pneumonia, there contracted, in order to liken the case to those inevitable casualties on which the rule is sought to be founded, it would have to be supposed that at the time when the slaves died of the disease in Chesterfield, it was prevailing at every point of the work in the county of Amelia at which they could have been employed according to the terms of the contract, infecting and destroying all within its range. For if a single point at which the slaves could under the contract have been at work in

Amelia, be left out of such supposed case, as one not visited by the disease, who could undertake to say that they might not have been at that point? Or if any be supposed to have escaped the fatal influence of the disease, who could say that these slaves might not have been equally fortunate?

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Whilst therefore I do not desire to be understood as affirming the impossibility of imagining a state of proofs which, consistently with the evidence set out in the bill of exceptions, could bring the case within the influence of the supposed qualification of the rule which the defendants desired to be declared in the instructions, I feel no hesitation in expressing the opinion that said evidence was not only wholly insufficient for the purpose, but did not conduce to such a result.

It was proved that the slaves died, during the year, while at work in the county of Chesterfield, of pneumonia, a disease which was very prevalent throughout that county at the time of their death. That during their sickness they were attended by a physician, and received all necessary and proper attention, and were provided with all necessary and proper comforts, and that the neighborhood of the places in the county of Chesterfield where the slaves died is a healthy neighborhood, and as healthy as the adjoining counties. It is obvious, I think, that there is nothing in this evidence, taken as a whole, or in any portion of it, taken by itself, which tends to prove that the slaves must or even probably would have died, if they had not been carried to Chesterfield. It asserts positively that they died of pneumonia, and that pneumonia was prevailing extensively at the time in Chesterfield. The fact that the negroes were properly attended to and provided for, whilst it exonerates the defendants from any imputation of neglect after the slaves sickened of the disease, does not tend to any result favorable to the

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defendants. It does not in the slightest degree conduce to show that the slaves must have sickened and died of pneumonia if they had been permitted to remain in Amelia. Nor is there any such tendency in the evidence with respect to the general health of the neighborhood of the places in which the slaves died. There was evidence to show that pneumonia was prevailing in *Chesterfield*, and *none* to show that it was prevailing in *Amelia*: And proof that the two counties stood on an equal footing in regard to health generally, has no tendency to establish the fact that the slaves must have become the victims of pneumonia if they had staid in *Amelia*.

With these views of the case, I cannot perceive how the defendants could have sustained any injury from the instructions of the court. No matter how true may be the proposition of law for which they contend, they cannot complain of the failure of the court to propound it to the jury, inasmuch as they have failed to show that there were any facts in the cause, or evidence tending to prove the facts calling for the application of such a proposition. It was not necessary for them to set out all the evidence in the case in their bill of exceptions, but it was incumbent on them to set out enough to show that they might have sustained injury from the ruling of the court. The court is bound, at the instance of either party, to instruct the jury as to so much of the law, and only as to so much, as governs the case presented by the evidence. Each party has a right to have the jury pass on any evidence which by rational deduction may lead to the finding of the facts that would make out his case or maintain his defense; but neither has a right to complain because of the court's refusing to declare abstract propositions of law ruling a supposed state of facts which no jury could find without indulging in mere random surmises and unfounded speculations. The

Circuit court having stated the general rule governing the case which the evidence proved or tended to prove, was not bound to go farther and state all exceptions to the rule that might obtain in every possible phase of the case that it might be within the range of human testimony to present.

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The probable if not the inevitable consequence of giving such an instruction as the defendants in the action say ought to have been given, would have been a misleading of the jury. They could not well have come to any other conclusion than that the judge believed there was something in the case to which the instruction could be applied. Confidence in this supposed belief might have been substituted by the jury in the place of their own views of the evidence, or otherwise they might have supposed that they had a license to go into uncontrolled guess and conjecture as to what might have been the possible fate of the slaves had they remained in Amelia.

I can see no error in the course of the Circuit court in regard to this instruction; and concurring as I do in the conclusions of the majority of the court here, in relation to the other causes of error assigned, am for affirming the judgment.

ALLEN, LEE and SAMUELS, Js. concurred in the opinion of MONCURE, J.

The judgment was as follows:

The court is of opinion, that if the facts were as supposed in the instruction given by the Circuit court in lieu of instruction number two, moved for by the plaintiffs in error, their wrongful act of carrying the slaves, which are the subject of controversy, beyond the limits of the county of Amelia, and working them in the county of Chesterfield, was not of itself a conversion of the said slaves to their use, by reason of

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which they became immediately responsible to the defendant in error for the value of said slaves in the event of their death, whether occasioned by such wrongful act or not. But the court is further of opinion, that if the death of said slaves was occasioned by the said supposed wrongful act, then the said act, in connection with the death of the slaves, was a conversion of them by the plaintiffs in error to their use, and made them liable, under either count of the declaration, for the value of said slaves: and if such death occurred while the said supposed wrongful act, by which it may have been occasioned, was in operation and force, the burden of satisfying the jury that it was not so occasioned devolves on the plaintiffs in error. The court is therefore of opinion, that the Circuit court erred in giving the said instruction, and ought, instead of that instruction and instructions numbered two and three moved for by the plaintiffs in error, to have given an instruction to the jury to the foregoing effect.

The court is further of opinion, that there is no other error in the judgment of the Circuit court.

It would have been improper to have given the instructions numbered four and five, because it belonged to the jury to determine not only from the facts therein stated, if proved, but from all the evidence, whether the supposed conversion, and the working of the slaves out of Amelia county, was waived or not; and also because, whether that act was a conversion or not, depended upon whether it occasioned the death of the slaves or not, and a waiver of the supposed conversion could not be inferred from facts which transpired, if at all, before the death of the slaves.

It would have been improper to have given instruction number six, because it appears from the evidence that the reception of the amount of hires for the slaves up to the period of their death was during the pendency of this suit; and the inference of a waiver of the supposed conversion, which might have been drawn

from a reception of the amount of hires, had that fact stood alone, is repelled by the additional fact of the pendency and vigorous prosecution of the suit at the time of such reception.

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The objection made to the instruction which was given in lieu of number four, is that it assumes the fact, of which the determination belonged to the jury, that by the original contract the slaves were to be worked only in the county of Amelia. If this instruction had stood alone the objection might have been valid. But it must be taken in connection with the other instructions; and so taken, there can be no doubt, and could have been none on the minds of the jury, as to the meaning of the court. The instruction is to be understood as if after the words "changed the original contract," the words "supposing it to be as stated in instruction number four," had been inserted therein.

In regard to the instruction mentioned in the second bill of exceptions. Some of the parol evidence was certainly admissible; and therefore it would have been improper to have excluded all. It would have been just as improper to have instructed the jury in general terms to disregard all parol evidence tending to alter, vary, explain or add to the written contracts mentioned in the said bill of exceptions. Nor was the court bound to sift the mass of perol evidence in the case, and determine which would alter, vary, explain or add to the written contracts, and which would not. It was the duty of the parties moving the instruction to point out the particular evidence objected to; and not having done so, the court, on that ground, was justifiable in refusing to give the instruction.

Therefore, the judgment is reversed with costs to the plaintiffs in error, the verdict is set aside, and the cause is remanded for a new trial to be had therein; on which the instructions of the court (should instructions be sought by the parties) are to conform to the foregoing opinion and judgment.

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1. In expounding a will the court will make the amplest allowance for the unskillfulness and negligence of the testator; technical informalities will be disregarded; the most perplexing complication of words and sentences will be carefully unfolded; and the traces of the testator's intention will be diligently sought out in every part of the instrument; and the whole carefully weighed together.
2. To aid in ascertaining the true construction of the will, evidence may be received of any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property; and as to all the surrounding circumstances at the time of making the will.
3. But declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest, is not competent evidence, except where the terms used in the will apply indifferently and without ambiguity to each of several different subjects or persons; when evidence may be received as to which of the subjects or persons so described was intended by the testator.
4. In construing a will effect must be given to every word, if any sensible meaning can be given to it, not inconsistent with the general intention apparent on the whole will taken together. Words are not to be rejected or altered unless they manifestly conflict with the intention of the testator, or unless they are absurd, unintelligible or unmeaning, for want of any subject to which they can be applied.
5. Though it may be possible the testator intended to give more, yet if there be a subject found to satisfy the description in the will, the court can neither enlarge or extend it.
6. But where the subject is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will be given to the devise notwithstanding; and the false and mistaken particulars of description will be rejected.
7. But if such particulars of description are restrictive in their character; if they serve to narrow and limit the extent of the subject pointed out by the previous words, they never can be rejected. And if there be a subject which satisfies the whole description taken together, evidence is inadmissible to show that the testator intended a greater or different subject.

8. If the words of the will describe nothing; or if with the aid of the surrounding circumstances they are insufficient to determine the testator's meaning, so that it may be ascertained with legal certainty what is the exact subject devised, the devise is void for uncertainty. 1855.
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9. Testator says, Second—"I give and devise to my daughter L all that part of my Marrowbone lands whereon I now live in the county of Henry, beginning on my spring branch at the bridge, running up the ditch of said branch to the head of said branch; thence with the line heretofore deeded by me to the said L and her husband W, to the Order line, to her the said L and her heirs forever." Testator owned other Marrowbone lands on which he did not live. Previous to making his will he had conveyed to L and her husband a part of the tract on which he lived, which was divided from what he retained, by a line which commenced at the mouth of the spring branch, and ran with it to the bridge, in a lane; thence with the lane fence a few rods to another fence; thence with this last fence to a horse lot, and thence direct to the Order line, which was the outer line of his tract. This fence ran in the direction of the branch, and some fifty yards below the spring ran close to or across the branch, but it left the spring outside about ten yards. The slip of land embraced between the branch and the fence was about nine acres. Although if the devise had stopped with the word "Henry," it might have been sufficient to pass the whole tract on which the testator lived, yet the language is capable of being restricted by the addition of boundaries. And as the surrounding circumstances did not show with legal certainty whether the whole or what part of the land was intended to be passed by the devise, it was void for uncertainty; unless it might be held to refer to the nine acres between the spring branch and the fence.

John Redd was a wealthy farmer living in the county of Henry. He seems to have had nine children, all of whom were married in his lifetime; and to whom he seems to have given property at different times. He owned a large body of lands lying on both sides of Marrowbone creek; there having been about fifteen hundred acres on the west side of the creek, on which he lived, and between five and six hundred acres on the east of the creek. All these lands were called his Marrowbone lands; though that on the east was called Wash's place, or the quarter; and that

1855. where he lived, the home place. One part of the
January Term. home place was called Crouch's field. A public road
Wootton v. passed through the land on the west of the creek, and
Redd's ex'or & als. nearly parallel to it, throwing about one-third of the tract between the road and the creek. The dwelling-house was west of the road, and the granary was between the road and the creek. The land on the west and east of the creek was cultivated separately, under separate overseers, and with separate hands.

In 1836 John Redd made a will, by which he devised to his daughter Lucy D. Wootton all that part of his Marrowbone lands in the county of Henry on which he lived, contained within certain specified boundaries. These boundaries included the southern part of the tract on the west of the creek, extending north to Crouch's field, and embracing the mansion-house of the testator, amounting to upwards of nine hundred acres. He gave to his son Edmund B. Redd about two hundred and thirty acres of the home place; and the remainder, including Crouch's field, was directed to be sold.

In 1838 John Redd seems to have made another distribution of property amongst some of his children. At that time he executed a deed by which he conveyed to John T. Wootton and Lucy D. his wife about five hundred acres of the land left to her by the will of 1836. The boundaries of this land separating the land conveyed from the land reserved, are described in the deed as follows: "Beginning at the mouth of my spring branch where it enters into Marrowbone creek; up the said branch to the bridge on the public road; thence running along the road a few rods to where the cross fence joins the lane fence that divides that part of the land that I now convey from the balance of the tract; thence along the said fence to my horse lot near Jarrett Patterson's; thence a direct line to my line formerly known as Harmer's, &c. Order line;

thence," &c. tracing the outer boundaries of the tract to the creek, and down the creek to the beginning. The Jarrett Patterson here spoken of, was the overseer of John T. Wootton, living on the land conveyed to Wootton and wife, and of which he had been previously put into possession.

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The spring which was the source of the spring branch, was about one hundred and twenty-five yards south of the mansion-house, and was that from which water was taken for use at the house. The branch ran from thence nearly east to Marrowbone creek. From its mouth to the bridge was seventy-three poles; and from the bridge to the spring was two hundred and seventeen poles; and from the spring to the nearest point in the line of the deed to Wootton and wife was one pole and twenty-one links. Between the spring branch and the fence described in the deed there was a slip of land of about nine acres, a part of it marshy, and a part rugged; and the whole of little intrinsic value. The fence seems to have crossed the branch about one hundred yards below the spring, and to have run for some fifty yards on the north of the branch, and then recrossed it. This, however, it was said was occasioned by the filling up of the natural channel of the creek, so as to divert the water to the south side of the fence; the natural channel being on the north side. The line from the horse lot to the Order line was about one hundred and twenty poles. From the spring to the Order line was still further.

In 1850 John Redd departed this life, having made a will and several codicils thereto, which were duly admitted to probat. This will was dated on the 17th of May 1843. By the first clause, he states that he has made advancements to his son Waller Redd equal to his share of the testator's estate; and therefore he gives one dollar to Waller Redd's daughter. The second clause of his will is as follows:

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"I give and devise to my daughter Lucy D. Wootton all that part of my Marrowbone lands whereon I now live in the county of Henry, beginning on my spring branch at the bridge; running up the ditch of said branch to the head of said branch; thence with the line heretofore deeded by me to John T. Wootton and the said Lucy D. Wootton to the Order line, to her the said Lucy D. Wootton and her heirs forever." The language of this devise to the word "beginning," was copied from the will of 1836.

After some other devises to two sons, he gives to his son Edmund B. Redd about eighteen acres of land, specifying the boundaries. This land adjoined the land on which the testator lived, but it was insisted by Lucy D. Wootton that it was not a part of what was called his Marrowbone lands. He also gave to him another tract of one hundred and twenty acres not connected with the lands on which he lived. And he then directed all the residue of his estate, real and personal, to be sold on a credit of twelve months, and the proceeds to be divided into eight parts, one of which he gave to each of his children then living, and to the descendants of other children who were dead. By a codicil to his will he gave to Lucy D. Wootton one thousand dollars. By his will he appointed his son John G. Redd and his sons in law James M. Smith and John T. Wootton his executors; and by a codicil made in 1845, he says that John T. Wootton having died, he appoints his son in law Peter H. Dillard one of his executors: And the three qualified as such; though John G. Redd seems to have died shortly afterwards.

The surviving executors having advertised the lands, including the home place, to be sold, Lucy D. Wootton in January 1851, filed her bill in the Circuit court of Henry county, in which she set out the will and codicils of John Redd, and insisted that under the

second clause of the will, all the testator's Marrow-bone lands on the west side of the creek, were given to her; and she prayed that the sale of these lands might be enjoined. By an amended bill she made all the devisees parties. Dillard, one of the executors, answered, expressing the belief that it was the intention of the testator to give to the plaintiff the whole of the tract on which he lived; and that he had done so by his will. Smith, the other executor, denied that such was the intention of the testator, or the effect of his will. He insisted that the testator only gave to the plaintiff the slip of land lying between the fence mentioned in the deed and the spring branch; and he said that he had always been willing she should take that into her possession. William O. Fontaine was the only adult devisee who answered the bill: He took the same grounds as the executor Smith.

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Several witnesses were examined, who expressed the opinion from conversations with the testator, that he considered the spring branch as the line between himself and John T. Wootton and wife, under the deed made to them: But it was proved that he had cultivated a small slip of ground south of the creek after the execution of the deed. The result of the other evidence has been already given, or it will be found stated in the opinion of Judge LEE.

The cause came on to be heard in May 1852, when the court held, that under the second clause of the will of John Redd, the plaintiff could only claim the land lying between the fence and the spring branch; and dissolved the injunction, and dismissed the bill. Whereupon the plaintiff obtained an appeal from one of the judges of this court.

The case was elaborately argued by *John T. Wootton* and *Patton*, for the appellant, and *Bouldin* and *Robinson*, for the appellees; but the questions raised, and

1855. the authorities cited, are stated by the judge, and need
January Term. not be repeated.

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LEE, J. The questions for the determination of the court in this cause, relate to the construction and legal effect of the second clause of the will of John Redd deceased. The will bears date on the 21st of February 1843; and the clause in question is in the following words:

"Second. I give and devise to my daughter Lucy D. Wootton, all that part of my Marrowbone lands whereon I now live, in the county of Henry, beginning on my spring branch at the bridge; running up the ditch of said branch to the head of said branch; thence with the line heretofore deeded to John T. Wootton and Lucy D. Wootton, to the Order line, to her the said Lucy D. Wootton and her heirs forever."

At the date of the will the testator owned about fifteen hundred acres of land situate on both sides of the creek named, of which between eight and nine hundred acres lay on the west side of the creek, and between six and seven hundred on the east side. The testator resided on the west side; and it appears that the land on the eastern side was tended and cultivated separately from that on the western side, with a different overseer and a distinct set of hands. Near the mansion-house of the testator was a spring from which flowed the branch referred to in the will as the "spring branch," emptying into Marrowbone creek. Running across that portion of the land lying on the west side of the creek in a direction nearly parallel to that of the creek, was a road designated the "Marrowbone road," which divided the land on that side into two parts, one of which, that bordering on the creek, was about a third of the whole on that side. This road crossed the spring branch upon a bridge at a point which would appear to be some eighty or

ninety poles from its mouth, and this "Pole bridge," 1855.
as it is called, is designated in the will as the place of January
beginning of the land devised to Mrs. Wootton. Some Term.
years previously to the making of this will, the testator had owned somewhere in the neighborhood of five hundred acres more of land on the west side of the creek, and constituting a part of his then mansion-house tract; being the upper portion upon the creek. By a will made in 1836 he had given to his daughter Mrs. Wootton, (wife of John T. Wootton,) a considerable portion of this land on the west side of the creek, being the upper portion thereof commencing on the creek at the upper corner at or near the ford of the creek which is designated as that near Dr. George Hairston's; thence running down the creek to the ford used in passing from the testator's house to his plantation on the eastern side of the creek called Dillon's; thence leaving the creek by several courses bearing in a northwesterly direction to the back line; and thence with the exterior lines to the beginning; containing between nine hundred and a thousand acres of land, and embracing the mansion-house, the spring, and the appurtenances. Subsequently, by deed dated on the 21st of April 1838, the testator conveyed to John T. Wootton and wife part of the land which he had thus given to Mrs. Wootton by the will of 1836, of which part, supposed to be about five hundred acres, it is recited in the deed that he had already placed John T. Wootton in possession. The land thus conveyed to Wootton and wife is described as beginning at the mouth of the spring branch on Marrowbone creek; thence up the branch to the bridge on the public road; thence along the road a few rods to where the cross fence joins the lane fence that divides the part conveyed from the balance of the tract; thence along the said fence to a lot designated; thence a direct line to the line known as "Harmer's, &c. Order line;" thence

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1855. with the exterior lines of the tract to Marrowbone
January creek; and thence down the creek to the place of
Term. beginning. The fence referred to in this deed as the
Wootton division line, begins at the line fence a few rods from
v. Redd's the Pole bridge across the spring branch before re-
ex'or ferred to, and runs up the branch to a point at which
& als. it crosses its modern channel at a distance of about one
hundred yards below the spring. Between this fence
and the branch below the point of intersection, and
bounded on the southeast by the lane fence, there is
embraced a small piece of land ascertained to be about
nine acres.

The appellant contends that under the terms of the will the whole of the lands owned by the testator lying on the west side of Marrowbone creek, was devised to her, (excepting a small piece of about eighteen acres devised to the testator's son Edmund B. Redd,) the quantity being about eight hundred and fifty acres by one survey, and about eight hundred and sixty-five by another. The appellees insist that what is described by those terms is the strip above mentioned of nine acres, and that this strip only passes by the devise. Or if it do not satisfy the terms of the description, then that the subject is so vaguely and imperfectly described that the devise is void for uncertainty.

That the clause in question is involved in some doubt and obscurity, will be apparent when it is considered that the testator has used a form of expression which may import the whole of the tract on which he resided, lying west of Marrowbone creek, or a part of that tract only, according to the force and effect of the particulars of description or boundary which he has superadded; and when it is ascertained that the supposed boundaries of themselves embrace nothing; that they constitute no diagram; that in effect they form but one irregular line the *termini* of which, the Pole bridge at one extremity and the intersection with the

"Order line" at the other, are nearly one mile apart. But however great may be the doubt and obscurity which rest upon the subject, and however difficult may be the task of eviscerating the intention of the testator, still if it can be ascertained by any legitimate means, it must be held sacred, and full effect must be given to it.

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In performing the duty of expounding a will, the court will make the amplest allowance for the unskillfulness and negligence of the testator, technical informalities will be disregarded, the most perplexing complications of words and sentences will be carefully unfolded, and the traces of the testator's intention will be diligently sought out in every part of the instrument, and the whole carefully weighed together.

Nor in the performance of this duty will the judicial expositor be confined to its mere contents. For an investigation into the state of facts under which the will was made will often materially aid in elucidating the scheme which the testator had in mind for the disposition of his estate. Hence he will endeavor to place himself in the situation of the person whose language he is called on to interpret; and as this can only be done by the aid of extrinsic evidence, such evidence may be resorted to for the purpose of showing the situation of the testator and the state of his family and of his property at the time of making his will. And, generally, evidence may be received as to any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of making the will. Wigram on Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, p. 11, et seq. Proposition 5, p. 51. Ibid. p. 57; *Smith v. Bell*, 6 Peters' R. 68, 75; *Doe v. Martin*, I Nev. & Mann. 524; *Shelton v. Shelton*, 1 Wash. 53, 56; *Kennon v. McRoberts*, Ibid. 96, 102;

1855. *Ellis v. Merrimack Bridge*, 2 Pick. R. 243; *Brainerd v. Coudry*, 16 Conn. R. 1. But if after exploring throughout the entire contents of the instrument, aided by a knowledge of all the facts known to the testator and of all the circumstances surrounding him at the time of making it, the judicial expositor is unable to penetrate through the obscurity in which the testator has involved his intention as to a material fact, the failure of the intended testamentary disposition is the inevitable consequence. Conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed sufficiently to indicate. The law has provided a definite successor to the estate in the absence of a testamentary disposition, and the heir is not to be disinherited unless by express words or necessary implication. 1 Jarman on Wills 315; Wigram on Ex. Ev. Prop. 6, p. 11; 1 Greenleaf's Ev. § 287, n 1.

The parties in this case have taken much testimony as to the situation of the testator and his family and property, and of other facts and circumstances surrounding him at the time of making his will, with a view to elucidate his intention and the scheme which he had framed for the disposition of his property. That all the evidence of this character may properly and legitimately be considered in passing upon the construction of the will, cannot be doubted. But there is another kind of testimony also offered, which comes in a more questionable shape, and to which exception has been taken. With a view to show that it was the intention of the testator in the second clause of his will to give to her all of the land which he owned on the west side of Marrowbone creek, (excepting the small piece devised to Edmund Redd,) the appellant has taken the depositions of various witnesses to prove declarations made by the testator, that he had given that part of his lands to her by his will,

or that it would be hers at his death, or that he intended to give it to her at his death, or other statements of the like import. The proofs of this character are, however, far from being satisfactory. Some of the witnesses by whom they are made are effectually discredited. Others appear to differ as to what the testator stated he intended for Mrs. Wootton. For example, the witness Patterson states that he understood the testator to say she would get the land down to the mouth of Crouch's branch; thence up the branch and crossing the road to the "Order line;" and that the place called "Crouch's field" was to be sold along with the land on the opposite side of the creek called "Wash's place" or "the quarter." And yet Crouch's field constituted a considerable portion of the mansion-house tract on the west side of the creek, which is now claimed by the appellant. But if the testimony of this character were sufficiently clear and explicit, I should think it not entitled to any consideration. It is well settled that such evidence is inadmissible to make out a testamentary gift. A party seeking to maintain a devise, must show it by a will in writing; and it would be wholly inconsistent with this rule, where a testator has failed to make a perfect and explicit disclosure of his scheme of disposition in his will, to permit its deficiencies to be supplied by parol proofs of declarations of the testator, or other similar evidence of actual intention. The enquiry is not what the testator meant to express, but what the words which he has used do express; and to such an enquiry evidence of instructions given by the testator for his will, or of his declarations as to what were his intentions in the disposition which he had made, or as to the disposition which he intended to make of his property, is obviously inapplicable; and the authorities against its admissibility are numerous and decisive. Wigram, Prop. 6, p. 83, 89, 97; *Bennett v. Davis*, 2 P.

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Laying aside then all these declarations of the testator, and other similar evidence of actual intention, as contradistinguished from the surrounding circumstances, we must endeavor, with the aid of the latter, to place ourselves in his situation, and thus interpret the language he has used. We must declare, if we can, what intention he has expressed with sufficient legal certainty, not the intention which he may have entertained, but which he has failed sufficiently to manifest. *Guy v. Sharp*, 1 Myl. & Keen 589, 602; *Martin v. Drinkwater*, 2 Beav. R. 215.

In the construction of wills it is a well settled rule that effect must be given to every word of the will, if any sensible meaning can be assigned to it not inconsistent with the general intention on the whole will taken together. Words are not to be changed or rejected unless they manifestly conflict with the plain intention of the testator, or unless they are absurd, unintelligible or unmeaning, for want of any subject to which they can be applied. *Gray v. Minnethorpe*, 3 Ves. jr. R. 103; *Constantine v. Constantine*, 6 Ves. R. 100; *Doe ex dem. Baldwin v. Rawding*, 2 Barn. & Ald.

441, 451; *Chambers v. Brailsford*, 2 Meriv. R. 25; *Doe v. Lyford*, 4 Mau. & Sel. 550. And though it may be possible the testator intended to give more, yet if there be a subject found to satisfy the description, the court can neither enlarge nor extend it. *Doe ex dem. Chichester v. Oxenden*, 3 Taunt. R. 147; *Doe ex dem. Oxenden v. Chichester*, 4 Dow. Parl. R. 65; *Jackson v. Sill*, 11 John. R. 201.

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But where the subject is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will be given to the devise notwithstanding; and these false or mistaken particulars of description will be rejected. Here the maxim "*falsa demonstratio non nocet cum de corpore constat*" properly applies. Thus, where a testator devised "all that his farm called *Trogue's farm*, in the parish of *Darley*, now in the occupation of *A. Clay*," but two certain closes which were part of *Trogae's farm* were not in the occupation of the person named. Yet it was held that the devise embraced the whole of *Trogue's farm*, and was not affected by the mistaken terms of description superadded; which might accordingly be rejected. *Goodtitle v. Southern*, 1 Mau. & Sel. 299. So where a testator devised to his wife his farm at *Bovington*, in the tenure of *John Smith*, &c. a portion of the farm was excepted out of the lease to *Smith*, but it was held that the words "in the tenure of *John Smith*," were but additional terms of description of a subject already sufficiently designated, and being mistaken, might be rejected. So that the whole of the farm was held to have passed by the devise. *Goodtitle v. Paul*, 2 Burr. R. 1089. So where there was a devise of all of a farm and lands called *Colt's Foot farm now on lease to Mary Fields at the yearly rent of one hundred and fifty pounds*, a close of seven acres, part of *Colt's Foot farm*, but excepted out of *Mary Fields' lease*, was held to

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have passed. *Down v. Down*, 7 Taunt. R. 343. So where a testatrix devised all her *Briton Ferry* estate, which was afterwards described as "situate, lying and being in the county of *Glamorgun* in the principality of Wales." A part of the *Briton Ferry* estate was in fact situate in the county of *Brecon*; yet held that the whole passed. *Doe v. Earl of Jersey*, 1 Barn. & Ald. 550.

A similar decision was made in a case in Maryland, in which a testator devised a tract of land by name, but which he went on to describe as lying in a particular county. This was deemed but a mistaken description, and it was held that the whole tract passed though part lay in another county. *Hammond v. Ridgely*, 5 Harr. & John. 245. See also *Hastead v. Searle*, 1 Ld. Raym. 728; *Wrotesley v. Adams*, Plowd. 187, 191; *Goodright v. Pears*, 11 East. 57.

The doctrine of these and similar cases the counsel for the appellant seek to invoke into this case. They maintain that as the particulars of description in the nature of boundaries contained in the devise to her constitute together but one irregular line, the *termini* of which are nearly one mile apart, describe nothing, embrace nothing, they must be disregarded. It is argued with great force that if such particulars giving a false or mistaken description of the subject, would not defeat the devise, still less should they do so, if they give no description, if they amount to nothing more than an abortive and ineffectual effort to describe something which it is impossible for them to describe. It is therefore insisted that these particulars of boundary should be wholly rejected as unmeaning and insensible, and that the subject of the devise should be ascertained from the previous description, which they allege is sufficient to identify it as the "home place" of the testator, or the whole of his Marrowbone lands lying on the west side of the creek.

But in order to bring this case within the influence of the principle asserted in the cases above cited, and the other cases to be found to the same effect, and to reject the particulars of boundary found in the devise, it must appear that the other words of the clause give a clear, certain and unambiguous description of the subject devised; and that the particulars given are but words of suggestion and affirmation superadded as further descriptive of a subject already and efficiently indicated. If on the other hand, such particulars are restrictive in their character, if they serve to narrow and limit the extent of the subject pointed out by the previous words, they never can be rejected. And if there be a subject found which satisfies the whole description taken together, evidence cannot be received to show that the testator intended a greater or different subject. If this were permitted, it would be in effect to make a will for a testator by parol when the law requires that it shall be evidenced by writing. And it would be dangerous to permit words of restriction used in a will intended to narrow or curtail the dimensions of the subject pointed out, to be rejected, and allow the party to claim under the general terms of the devise discharged of the restriction. The effect might be to impute to a testator a meaning which he never intended, and to make him thus give the whole when it was his wish and intention to give part only. Thus for example, in this case, if the testator's mansion-house tract, instead of lying wholly within the county of Henry, had lain partly in that county and partly in Pittsylvania, and he had omitted the name of the county in this clause of his will, so that it read "I give to my daughter Lucy D. Wootton all that part of my Marrowbone lands whereon I now live in the county of . ." Here would be an imperfect, incomplete description, creating an ambiguity patent on the face of the will. Nor could the blank be filled by

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1855. evidence. *Hunt v. Hort*, 3 Bro. C. C. 311; *Miller v. January Term. Travers*, 8 Bing. R. 244; Wigram, p. 88, pl. 121. The superadded words, however, could not be regarded as merely words of description of a subject already sufficiently described. They would plainly appear to have been intended to be words of restriction, and to reject them would be to give the whole of the lands in both counties, when it was the testator's intention to give the part lying in one only. Numerous cases in which words of description found in a devise were yet held to be restrictive, and therefore such as were not to be disregarded are to be found in the reported decisions. Thus in *Woodden v. Osbourn*, Cro. Eliz. 674, the words "*in Cokefield*" were held to be restrictive, and to limit the devise of all the testator's *Hayes* land to such as he had in *Cokefield*, though it appeared that he had other lands called *Hayes* lands in *Cranfield*. In *Parkin v. Parkin*, 5 Taunt. R. 321, the devise was of all the lands, tenements, &c. of the testator in the township of *Thurgoland*, "then in his own occupation." At the time of making his will the testator was seized of a messuage and five acres of land in the township of *Thuryoland*, which were then in his own occupation. He was also seized of an inn and nine acres of land in the same township, but which were not at that time occupied by him. Held, that the words of occupation were clearly restrictive, and that the inn and nine acres did not pass by the devise. So where a testator reciting that he was seized of divers freehold lands in *Islington*, and certain copyholds, "*and all which lands, &c. were subject to a mortgage thereof made by him,*" (which he described,) gave and devised all his said freehold and copyhold lands and hereditaments. At the date of the will the testator owned twenty-one acres of freehold lands in *Islington*, which were not embraced by the mortgage mentioned in the will; and it was held that the words referring to the

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mortgage were to be regarded as restrictive, so that the twenty-one acres did not pass by the devise. *Pullin v. Pullin*, 3 Bing. R. 47. In *Jackson v. Sill*, the words "which I now occupy," annexed to a devise of lands, were held to be restrictive, and not such terms of additional description as could be rejected; and it was accordingly held that a tract of land of ninety acres, which the testator had leased to another person before making his will, did not pass by the devise. So in another case, the words "on which I now live," annexed to a devise of lands, received a similar construction, and were held to exclude a lot of sixteen acres not adjoining and which had been on lease to others. *Jackson v. Moyer*, 13 John. R. 531. Other cases are to be found in which under different forms the same principle is asserted and enforced.

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We come then to the question whether the words of local description in the nature of boundaries found in the devise in this case are terms of additional description merely superadded where the subject of the devise had been already clearly and unmistakably indicated, as the whole of the lands on the west side of Marrowbone creek? Or were those words intended to be restrictive in their character, so as to limit the devise to a portion of those lands, and if so, to what portion? And here the enquiry at once suggests itself, why should the testator, if he had intended to give the whole of the lands on the west side of the creek, have added any boundaries at all? The obvious and plainest mode of making such a devise would have been to give all the lands on the west side of the creek, or in the form adopted by the testator, to stop at the end of the words "whereon I now live," and the addition of boundaries was wholly unnecessary. But this he has not done. He has adopted a form of expression, "all that part of my Marrowbone lands," which, whilst it might import all the lands on the west side

1855. of the creek if it had stopped with the words "whereon
January Term. I now live," may and must import a part of those
Wootton lands only, if the words of description superadded
v. operate to restrict it to a part. And we are not without
Redd's a history of the particular form of expression used.
& als. The words of the devise were copied from the will of
1836 down to the word "beginning," inclusive, and then different boundaries were inserted in place of those found in that will. By the will of 1836 the testator did not give the whole of the mansion-house tract or the lands lying on the west side of the creek to the appellant, but gave a part only: for the boundaries given excluded all that portion lying north of Crouch's branch and of a line running from the public road where it crossed the branch to the "Order line," being about four hundred and five acres. So that we see the boundaries which followed the same form of expression in the will of 1836 were intended to restrict the general description to that portion of the land on the west side of the creek lying south of Crouch's branch and the line above specified. It is true those boundaries are replaced by different boundaries in the will of 1843; but when the testator used the same form of expression in the latter though giving different boundaries, it may not be unreasonable to infer that he intended the boundaries to perform a similar office to that for which they had served in the will of 1836, and restrict the devise to a part of the mansion-house tract. It will be seen too that when the testator speaks of the whole of a tract, he says "a tract," and gives a general designation of the land intended, without attempting to give the exterior boundaries. Where, however, he speaks of part of a tract, he uses the expression "that part," and then goes on to describe the part intended by boundaries or some specific local demarcation. This would seem to have been his mode of thought upon the subject, and it may almost be re-

garded as a law of the will. It tends to show that when the testator uses the expression "a part of his lands," he has in mind a part to be circumscribed by metes and bounds, not the whole of a tract to be designated by general terms of description.

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Again. If the testator intended to give the whole of the lands on the west side of the creek, why not commence the boundaries at some point on the creek, or at the terminus of some one of the exterior lines? Why commence in the middle of a line at a point some eighty or ninety poles from the creek? If on the other hand, he intended to give only the nine acres lying between the line of his deed to Wootton and wife and the spring branch, then he commenced his description at the point at which he naturally would and ought to commence it. For it is at that point that the line of the deed deflects from the course of the spring branch and runs along the lane to the cross fence, and thence with that fence as stated in the deed, so as to form a diagram with the spring branch, embracing the nine acres, the apex of which is at the point designated as that of the beginning.

It is to be observed too that in the fifth clause of his will the testator gives to his son Edmund Redd a part of his land lying on the west side of the creek, which he describes by specific boundaries. This, though perfectly consistent with the devise to Mrs. Wootton, if it be restricted to the nine acres, is yet irreconcilable with it if it is to be regarded as a devise of all the lands on the west side of the creek. It is true that irreconcilable devises may occur in a will, so that all cannot stand together, and that in such a case, where the repugnancy plainly appears, the prior devise must yield to that which is posterior in local position so far as may be absolutely necessary to give effect to the latter, but no further. But where the enquiry is as to what is embraced in the prior devise,

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a subsequent devise may be properly looked to as tending to show the true subject of the former devise; for it will not be supposed that the testator intended to give by the posterior devise what he had already given by the former. It is said, however, that the land devised to Edmund Redd was not a part of the Marrowbone lands. But it is nowhere shown to be a separate and distinct tract. The proofs are, I think, rather the other way. *Perkins* says expressly that he believed it was a part of the Marrowbone tract on which the testator lived; and *Patterson*, *Dillon* and *Dupuy* seem to regard all the testator's lands on the west side of the creek as part of his home place or Marrowbone lands. It is so laid down on the plat of *Wingfield*; on that of *Graves* it is not so represented. The argument indeed is that by the terms "Marrowbone lands," all the testator's lands on both sides of the creek were included; and that by the words "all that part of my Marrowbone lands whereon I now live," was meant that portion of them lying on the west side of the creek, and not a part of the latter.

With regard to the meaning thus assigned to the terms "Marrowbone lands," I will here remark that whilst such a form of expression is frequently, perhaps most usually employed to denote the lands on both sides of the water course named, yet it is not of necessity used in that sense only. From the situation of lands on one side relatively to a water course and to some other stream uniting with the former upon which they may chance also to lie, or from some other local circumstance or because they had acquired some other notorious name and designation, it might very well happen that the lands on the other side only would take the name of the particular water course. And the question is, in what sense did the testator use the terms? What lands did he intend to designate by the words "Marrowbone lands?" The proofs tend rather

to show that it was his habit to apply those terms to the mansion-house tract, the lands on the west side of the creek, whilst he spoke of the lands on the opposite as "*Wash's place or the quarter,*" and sometimes as "*Ellis'.*"

But it is said there was no inducement to give Mrs. Wootton the nine acres; that it was of little value to any one, and of no peculiar value to her; and that in point of fact when he made his will, the testator regarded it as already hers, because he believed the spring branch was the line between his land and that conveyed to Wootton and wife. I do not think it satisfactorily proven that such was the testator's impression. It is true some of the witnesses testify to their having heard him speak of the spring branch as the line, or say that the lands south of the spring branch belonged to Wootton and wife. Others say that he recognized the fence as the line; and it is proved that he had a part of the strip between the fence and the branch in cultivation. It may be that in speaking of the branch as the line or of the land south of the branch as the land of Wootton and wife, he intended only to give a general idea of the course of the division line, without designing to state with precision the exact line named in the deed which he knew run so near the branch.

In the original bill filed by the appellant there is no suggestion of any such belief or impression having been entertained by the testator; and whilst it is admitted that the fence was the line, it is not intimated that any other had been recognized by him. The line is described minutely and unmistakably in the deed. It leaves the branch at the Pole bridge and runs along the road a few rods to the junction of the cross fence with the line fence; thence with the former to the horse lot, &c. And from the manner of expression used in the deed, and the similarity of style and in

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January Term. infer that it was written by the same person who
wrote the two codicils purporting to have been written
by the testator himself. But however this may be,
Wootton he was doubtless familiar with the contents, and know-
v. Redd's ing the ground perfectly, he may have had some rea-
ex'or & als. son when he made the deed for deviating from the
spring branch and adopting the fence as the division
line instead. He is represented by all the witnesses
who speak of his mental character and capacity, as
being a man of vigorous intellect, and remarkable for
caution in the transaction of business. It is difficult
to suppose that such a man would in a few years have
forgotten or become confused about a division line
which he had carefully established between his own
land and that of a neighbor; while upon the other
hand, if he had changed his purpose of giving a large
part of his home place to Mrs. Wootton as he certainly
had in regard to his son Edmund Redd, it might have
occurred to him that it would be proper (not knowing
into whose hands the homestead might fall) to secure
to Mrs. Wootton the strip between the spring branch
and the fence as he seems to have thought it proper
to secure to Edmund Redd the small piece of eighteen
acres on the opposite side of the tract, north of the
still-house branch. He may have thought as many
of the witnesses examined seem to think) that it would
be important to Mrs. Wootton to have free access to
the branch for water for her hands and stock, of which
the supply would seem to have been otherwise scanty
on that side of her land: and he knew that to run
with the branch would straighten the line, save fencing
and improve the form of both properties, while it
would substitute a permanent natural boundary for
one easily changed and in its nature perishable. That
the will devises to Mrs. Wootton while the deed is to
Wootton and wife, offers no difficulty. Husband and

wife are treated as one both in common parlance and in law for most practical purposes, and from the character of the provisions of his will the testator appears not to have discriminated between them.

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I think there is not much force in the argument that such terms as "all that part of my Marrowbone lands" could not have been intended to describe a small piece of land of nine acres. "All that part" is but a formal mode of legal expression, importing the entirety of the thing devised, whatever it may be, and not that it is either great or small. They were evidently used as words of form, copied from the will of 1836, which the testator had adopted as his guide as to the formal parts of the instrument, whilst the substantial parts were supplied by written memoranda or dictated orally by him at the time. Nor is there any thing in the local position of the devise to Mrs. Wootton, being the second clause of the will, to raise a presumption that the testator intended to give her a large or substantial part of his lands, for we see that the bequest that precedes it, constituting the first clause of the will, is a nominal one of one dollar to his grand daughter Mrs. Preston.

Some stress has been placed on the fact that the wife of the testator and some of his children were buried on the home tract; and it is urged that it is not likely the testator would have directed that tract to be sold, and thus rendered it liable to pass into the hands of strangers. Upon subjects of this character men differ in their feelings and sentiments. In this country, where the character of our institutions combines with the spirit of the age to encourage the ready disposal of property of all kinds, which is accordingly constantly changing hands, this sentiment of attachment and veneration for a particular spot, where rest the remains of the deceased, is liable to be weakened and impaired. We have no clue to what may have

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been the particular sentiments of the testator on this point, though we see that he directs all his negroes to be sold, among whom, it is said, were old and valuable family servants. It may be that the value of the improvements on the home place was such as to render it difficult to divide it in a manner that he approved, and he may have thought that some member of his family would buy it in at the sale. At best, it is a mere circumstance, and one of little weight or significance.

But little light is thrown upon this subject by a comparison of the amounts that will have been received by the different children in the form of advancements, and of their respective shares under the will. In *Choat v. Yeats*, 1 Jac. & Walk. 104, Sir Thomas Plumer (master of the rolls) remarked, "It is always the safest mode of construction to adhere to the words of the instrument, without considering either circumstances arising *aliunde* or calculations that may be made as to the amount of the property and of the consequences flowing from any particular interpretation." This remark is cited with approbation by the vice chancellor in *Parker v. Marchant*, 1 Younge & Col. 290, 310. But from the best estimate which I have been enabled to make from the materials in the record, I think Mrs. Wootton will have received considerably more than either one of several of the children, and it may not be very remarkable that she may get less than some of the others. The evidence does not, I think, establish any thing like a marked partiality or favoritism on the part of the testator towards any of his children. There are some rather vague expressions of opinion by witnesses that Mrs. Wootton was a favorite, and some declarations proved of Edmund Redd to that effect. The reasons assigned for such opinion are not very satisfactory, and the general effect of the evidence is rather to prove that the testa-

tor cherished feelings of kindness and parental affection towards all of his children. And it would seem to be unexplained why the testator should have given to Mrs. Wootton the further sum of one thousand dollars by a codicil if he had in fact given to her the whole of the home place: whilst on the supposition that he had given her the nine acres only, a ready reason is suggested for his giving her that additional legacy.

The objection which has been urged to construing the devise to be of the nine acres, that the testator is thereby made to give to Mrs. Wootton a piece of land already belonging to her on the south side of the fence where the branch passes on that side near the spring, is I think sufficiently explained by the testimony. It is shown that the true original channel of the branch was upon the north side of the fence throughout, but that in consequence of a large deposit made on a lot of the testator on the branch, its course had been changed at that point and made to pass on the south side of the fence; and that if such deposit were removed, the branch would resume its original channel. And when the testator spoke of the branch, it may be presumed he referred to its proper original course and not to the new or artificial channel occasioned by the obstruction. There may be more difficulty in explaining why the testator should have called to run from the head of the branch "with the line heretofore deeded to John T. Wootton and the said Lucy D. Wootton to the Order line," when no part of the line mentioned in that deed as running to the "Order line," beyond the point of intersection with the line from the head of the spring, is any part of the boundary of the nine acres. But it will be remembered that the fence called for in the deed does not touch the spring, but passes it at a distance variously estimated at eight yards or from eight to twelve steps. The proper call

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1855. therefore for the next course, after attaining the head
January Term. of the spring, would not be to run *with* a line so far
Wootton v. distant from it, but to run *to* that line. Hence if we
Redd's ex'or & als. may suppose that from some confusion or misappre-
hension at the moment either on the part of the testa-
tor or of the scrivener, the word "with" was inserted
instead of the word "to," which would seem to be
the proper word indicated, the whole difficulty will be
removed, and the call thus explained will be in effect
to run from the head of the spring to the line in the
deed to John T. Wootton and Lucy D. Wootton,
which runs to the "Order line." So that this line
would not be made, as it could not be (beyond the
point of intersection) any part of the boundary of the
nine acres, but would be simply referred to as that in
which the terminus of the line running from the head
of the spring was to be found. Or it may be that the
testator having in mind the land which he had con-
veyed to Mr. and Mrs. Wootton and the line named in
the deed which divided it from the land retained by
him, and desiring to substitute the branch to its head
as the division line in place of the fence, therefore calls
to begin at the Pole bridge, (the apex of the figure
embracing the nine acres and the point at which the
line of the deed leaves the branch,) and thence con-
tinues the line of division beginning at the mouth of
the branch (on the creek) by running up to its source,
and then finishes the entire division line by calling to
run with the line of the deed to the "Order line."
From its mouth to the Pole bridge, the branch was the
division line according to the deed: by his will he con-
tinues the branch as the division line to its source, and
then completes it by running from the spring with
the old division line of the deed to the "Order line."
Upon one or the other of these hypotheses, I think a
probable solution of the difficulty may be accom-
plished: and it can occasion no surprise that a man

who though of vigorous mind, was yet of but limited education and no doubt but little accustomed to systematize his thoughts or to reduce them to writing, should when he attempted to do so, be betrayed into inaccuracies and evince a want of order and method in the arrangement of his ideas and in the manner of giving expression to them. But if any solution of this difficulty were impracticable, I should think it less objectionable to disregard this doubtful call altogether than to reject all the particulars of description by boundaries in the devise, when from the particular form of expression adopted it is manifest that they either were or might have been intended to narrow the subject pointed at, and to restrict the gift to part instead of giving the whole.

I think therefore the piece of land between the fence and the branch is a subject which satisfies the description found in the devise when viewed in the light of the surrounding circumstances: that no evidence can therefore be received to prove the actual intention of the testator to give a greater or different subject, and that although possibly the testator may have intended to give more, yet the devisee can claim nothing but the subject so described.

But if it could be shown that this piece of land does not satisfy the description of the subject devised to Mrs. Wootton by the will, still I think the result to which we must be brought will be the same.

I have already endeavored to show that words of description in a devise can only be rejected where the subject is already sufficiently and clearly designated, and it is manifest they are merely words of description superadded where the subject is already perfectly described. If the words be restrictive, they never can be rejected; and it must be equally clear that they cannot be rejected if it be doubtful as they stand, whether they are descriptive merely, or descriptive

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1855. and restrictive. For while there is such doubt, it
January Term. never can be said that the subject is clearly and suffi-
ciently described. Nor in such a case will the law
Wootton intend error or falsehood. *Doe v. Greathead*, 8 East's
v.
Redd's R. 91, 104. Here then if the strip of nine acres does
ex'or
& als. not satisfy the description given in the devise, it must
be absolutely uncertain what it is they do describe,
and whether the boundaries given were intended to be
descriptive merely or restrictive also. The form of
expression adopted, followed up by particulars of local
description by boundaries, is such that it is at least
doubtful whether the testator, by the terms "Marrow-
bone lands," referred to the lands on both sides of the
creek, or on one side only. And if it be so, you can-
not safely reject those particulars of description, and
give effect to the previous clause, without regard to
them. Before you can do so, you must first be satis-
fied that they were not intended to be restrictive. The
testator then has given all that part of his Marrow-
bone lands whereon he then lived in the county of
Henry, beginning at the Pole bridge, running up the
branch to its head, and thence with the line named to
the "Order line." What part of these lands is thus
described? What fixes and determines its extent?
We have here an irregular line between the Pole
bridge and the "Order line," given as a base line upon
which may be described an infinite series of diagrams,
all varying in the quantity of land contained. And
this uncertainty as to the extent of the subject devised
must be equally fatal to the pretensions of the appellee.
For a party claiming under a devise must show
with certainty what subject was intended to be given.
If the words of the will describe nothing, or if with
the aid of the surrounding circumstances, they are insuffi-
cient to determine the testator's meaning, or to
enable the judicial expositor to ascertain with legal
certainty what is the exact subject devised, the testa-

mentary disposition must be ineffectual and void for uncertainty. Wigram, Prop. 6, p. 83; *Doe ex dem.* 1855.
Dell v. Pigott, 7 Taunt. R. 558; *Richardson v. Watson*,
4 Barn. & Adolph. 787; *Mason v. Robinson*, 2 Sim. &
Stu. 295; *Tolson v. Tolson*, 10 Gill & John. 159.

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If then the strip of nine acres satisfies the words of description in the devise, the Circuit court has not erred in decreeing it to the appellant. If, however, the devise is void for uncertainty, the appellant gets the nine acres under it: and of this the appellees do not complain, and the appellant cannot. In either view, therefore, I am of opinion to affirm the decree.

DANIEL and **MONCURE**, Js. concurred in the opinion of **LEE**, J.

ALLEN, P. and **SAMUELS**, J. dissented.

DECREE AFFIRMED.

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CORBELL'S *ex'or v. ZELUFF & als.*

March 5.

An act of assembly empowers a County court to authorize G, administrator of Z, to sell and convey a tract of land belonging to the estate of Z, on such terms as the court may deem expedient; and to decree the mode in which he shall account for the proceeds of sale to those entitled thereto: having first required of the administrator a new bond with security conditioned to perform the decree of the court, and account for the proceeds of said sale to the parties entitled, according to the directions of the court. And should G refuse or neglect to give such bond for two months after the passage of the act, or should the court deem it proper to appoint some other person to carry the act into effect, it was authorized to do so. G gave the bond, but not within the two months: And then the court made a decree reciting that G had given the bond according to the act of assembly, authorizing G to sell the land on a credit specified, and to take from the purchaser three bonds with security, and a deed of trust on the land, the bonds to be payable to G, administrator, and to be returned to the County court, and to be subject to their order. G sold and conveyed the land, and took the bonds with security, and after they had become due, reported to the court that the purchaser had paid off one of the bonds, and a certain amount of another. The land was afterwards sold to pay the balance due, and did not bring enough to satisfy that balance, which was paid by the sureties of the purchaser. G and the purchaser became insolvent. HELD:

1. That G in acting under this statute acted as administrator, and not merely as a commissioner of the court to sell land.
2. That payments made *bona fide* by the purchaser to G were valid payments, for which his sureties in the bond executed under the statute, are liable to the parties entitled to the proceeds of the land.
3. Upon a former appeal the Special court, with all the parties interested before it, having held that the bond was valid, though executed after the two months, that judgment concludes the question, though the decree of the court below was reversed because the proceeding was by petition, and the cause was sent back to be regularly prepared and matured.

Peter Zeluff, a citizen of the state of New York, died some time previous to September 1837, leaving a

widow and three infant children. By his will he gave the principal part of his estate to his wife during widowhood; and if she should marry she was to have a child's part; remainder to his children. At his death he owned a small tract of land in the county of Nansemond in the state of Virginia: And Edwin Godwin qualified here as his administrator.

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On the 9th of March 1838, the general assembly of Virginia passed an act, by which it was enacted, that the County court of Nansemond shall have power and authority to authorize Edwin Godwin, administrator of the estate of Peter Zeluff in the state of Virginia, to sell and convey the tract of land in the county of Nansemond, which belonged to the estate of Peter Zeluff at the time of his death, on such terms as the said court may deem expedient; and decree the mode in which he shall account for the bonds or other proceeds of said sale to those entitled thereto; having first required of the administrator a new bond with such security as the said court shall deem sufficient, conditioned to perform the decree of said court and account for the proceeds of said sale to the parties entitled thereto, according to the directions of the court. And should the said Godwin refuse or neglect to give such bond with such security, within two months after the passage of this act, or should the court deem it proper to appoint some other person than the said Edwin Godwin, the said court shall appoint some other fit person to carry the sale into effect, taking bond and security as aforesaid. And the proceeds of the sale were directed to pass as the land would have done.

The proceedings which were had under this act, and in this suit, are stated in the opinion of Judge ALLEN, and need not be repeated. The appeal was obtained by the executor of Samuel Corbell, one of the sureties of Godwin in his bond.

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C. Robinson, for the appellant.
Heath and Tazewell Taylor, for the appellees.

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ALLEN, P. It was alleged in argument, though not assigned as one of the errors in the petition, that as the bond required from Edwin Godwin, administrator of Peter Zeluff deceased, in pursuance of the act of assembly passed the 9th of March 1838, entitled an act authorizing the sale of the lands of Peter Zeluff in the county of Nansemond, was not executed by him within two months after the passage of the act, the bond was taken without authority, and therefore void.

The act referred to, conferred on the County court jurisdiction to authorize the said administrator to sell and convey on such terms as the court might deem expedient, and to decree the mode in which he should account for the bonds or other proceeds of said sale to those entitled thereto, having first required of the said administrator a new bond, with such security as the court should deem sufficient, conditioned to perform the decree of the court, and account for the proceeds of said sale to the parties entitled thereto, according to the directions of the court. On the 14th of May 1838 the widow and children, devisees of Peter Zeluff, petitioned the County court to carry the act into effect by making the necessary order. The court, upon the presentation of the petition, entered a decree or order, which, after reciting that the administrator had given bond under and according to the act of assembly, authorized him, after advertising the land, to sell the same on a credit of six, twelve and eighteen months, (except for so much as would pay costs and charges of the sale and decree,) the whole carrying interest from the first day of January ensuing, taking from the purchaser three bonds with security and a deed of trust on the land to secure the purchase money; the bonds to be payable to said E. Godwin, administrator, and

to be returned to the said County court, and to be subject to their order: the decree further reciting, that the court would, at a future day, make a further order disposing of the fund to be raised by a sale of said land, and also make any other order in the premises which might seem proper.

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On the 10th of April 1843 Edwin Godwin made a report, showing that the land was sold on the 9th of July 1838, to Elizabeth Godwin, who, with her securities, executed three bonds for one thousand dollars each, and paid the residue in cash: and he filed with his report two of the bonds; one subject to a credit of three hundred and fifty dollars, paid the 12th of December 1840, and to a further credit of fifty dollars, paid March 22d, 1841, endorsed by him as administrator; the balance of said amount the report states had been paid to the administrator. The bonds or single bills filed with the report, do not set forth the consideration for which they were given, and are payable to him as administrator. By the report Edwin Godwin charged three hundred and nineteen dollars and fifty-three cents for commission and expenses of sale. When this report was filed, it was ordered to lie for exceptions; and on the 12th of August 1844, the widow and children of P. Zeluff excepted to the report on account of the charge for commission and expenses, and because he did not bring the bonds into court.

On the 14th of July 1845, the cause coming on to be heard on the report, exceptions and papers, the County court was of opinion that the principles of the case should not be settled until all the parties interested were before the court; and therefore ordered that Elizabeth Godwin the purchaser, with her securities, and also the securities of Edwin Godwin in the administration bond, should be summoned to show cause why the exceptions should not be sustained, and

1855. to show cause if any they had against the said report
January Term. and sale, and to abide such order as the court might
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The summons being executed, the securities of Edwin Godwin filed answers, relying, amongst other things, on the ground that the two months prescribed in the act having expired, the authority of the court to appoint the said E. Godwin to sell the land had ceased and determined; and consequently the bond not having been executed in conformity with the statute, was merely null and void.

The cause being matured for hearing, the County court dismissed the petition: Whereby it was in effect decided, that the sale made by said Edwin Godwin was invalid; and the plaintiffs, if the decree has stood would have been left to pursue their legal remedy to recover the land as devisees of Peter Zeluff. Upon appeal to the Circuit court this decree was reversed, and a decree pronounced declaring that Edwin Godwin was liable to account to the appellants for the whole amount paid to him by the purchaser of said land; and in the event of his estate being insufficient to pay, that the securities in the bond were liable; and that the purchaser was liable for the balance due on her bonds. For the payment of such balance of the purchase money, a decree was rendered directing a sale of the land, recited by the decree as having been conveyed by said Edwin Godwin to Elizabeth Godwin. The land was sold, and the proceeds not being sufficient to pay off the balance of the purchase money due from the purchaser on her bonds, a personal decree was rendered against her and her securities for such balance, after crediting the net proceeds of the sale of the land. And the decree against the estate of Edwin Godwin having proved unavailing, a decree was rendered against the securities in his bond for the amount received by him.

From this decree the sureties of Edwin Godwin obtained an appeal to this court; and the Special court of appeals being of opinion that it was error in this proceeding in the state in which it stood in the Circuit court, to render a decree against the said securities of Edwin Godwin, or to determine whether those securities or the purchaser were primarily liable for the money improperly received by Edwin Godwin; and that it was also error in this proceeding to render a decree against the sureties of the purchaser for the balance due on her bonds for the purchase money; and that there was no error in the residue of the said decree, more especially as Elizabeth Godwin had not appealed therefrom; reversed so much of the decree of the Circuit court so declared to be erroneous, and affirmed the residue thereof; and remanded the cause with directions to allow the petitioners to file a bill bringing Elizabeth Godwin and her sureties, and the sureties of the said Edwin Godwin in said new bond, properly before the court, and in due form for litigating the several matters in respect to which the decree had been reversed.

When the cause went back, the petitioners filed a new bill, from which it appeared that the balance due on the bonds for the purchase money had been fully paid and satisfied; and the contest went on as to the amount received by the said Edwin Godwin.

The sureties in the new bond appeared and answered, referring to and relying on their former answer; and furthermore insisted, as they had done in the former answer, that the payment of the purchaser was made to Edwin Godwin without authority; that she thereby aided him in perpetrating a fraud, and that the payment so made in her own wrong, did not discharge the obligations given for the purchase money. The sureties of the purchaser and her administrator insist on the validity of the payment, and that

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they had fully discharged themselves from the liability incurred by their obligation for the purchase money. No new fact was brought into the case by this supplemental proceeding: and the court being of opinion that the sureties of Edwin Godwin were liable for the amount paid to him, and the decree against his estate proving unavailing, proceeded to render a decree against the sureties for the balance unpaid; from which decree the representatives of one of said sureties has appealed.

Upon these proceedings it seems to me the authority of the County court to decree the sale of the land by Edwin Godwin has been adjudged, and in a proceeding to which, as to that question, all the sureties were parties.

As to which set of sureties were primarily liable, or whether any valid payment was made by the purchaser, or whether her payments were fraudulent in fact or not; these were questions which, in the opinion of the Special court of appeals, could not be decided in that proceeding as it then stood. The proceeding was upon the original petition to exercise the jurisdiction conferred by the act of the 9th of March 1838. Under that act the new bond had been taken from the administrator Edwin Godwin, and a decree rendered directing him to sell, and a sale and a report made; and all the parties, the sureties in the new bond executed by the administrator, and the purchaser and her sureties, were summoned to show cause against the said report and sale, and to abide such other orders as the court might pronounce in the cause. If the authority of the court to appoint the administrator had ceased, the judgment of the County court dismissing the petition should have been affirmed. The power of the court to render any decree in that *ex parte* proceeding to carry out the provisions of the act of March 9th, 1838, depended upon the fact whether a valid

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bond had been given by the administrator; the law having conferred the jurisdiction on the court to authorize the administrator to sell and convey upon the condition of having first required of him a new bond. The court required a bond, and thereupon ordered the sale. The jurisdiction to do so being conferred, the propriety of exercising it under the circumstances, was a question for its consideration when applied to by the petitioners to carry the act of assembly into effect. By accepting the bond, and thereupon authorizing the administrator to sell, the court affirmed that the bond, though not executed until after the expiration of two months, was a substantial compliance with the law, and invested the court with the power to authorize the administrator to sell. At a later period the County court changed its opinion, and dismissed the petition, thereby annulling all that had been done, and declining to carry the act of assembly into effect according to the prayer of the petition. The case itself was proper for the consideration of these questions. The regularity of the proceedings and the propriety of exercising jurisdiction under the facts before the court were questions arising in the case itself, and not upon any collateral enquiry: And a judgment would be conclusive, at least to that extent, upon all who were made or became parties to the case. The administrator, the securities in the new bond, the purchaser, and her securities, all had such an interest in these questions as to justify the order requiring them to be summoned to show cause against the report and sale. They were summoned and the sureties of the administrator raised the objection to the authority of the court to require the new bond: The Circuit court by its decree affirmed the validity of the bond and the sale; affirmed, moreover, that by the sale of the land and its conveyance by Edwin Godwin to the purchaser, the title had passed to her; for it proceeds to

1855. decree a sale of the land to discharge the balance of
January Term. the purchase money. The land was sold under its
order, and the sale confirmed; thus forever divesting
Corbell's ex'or the title of the petitioners, in this proceeding, to carry
v. Zeluff into effect the provisions of the act of March 9th,
& als. 1838: A conclusion which could only be justified upon
the ground, that the authority conferred by that act
had been properly exercised. The decree of the Cir-
cuit court to the extent that it operated upon the
validity of the sale, the divesting of the title of P.
Zeluff's devisees, and the transmission thereof to the
purchasers under the different decrees in the case,
was affirmed by the Special court of appeals, and at
least concludes all those who were parties, upon those
questions.

If the bond was valid and the sale regular, it be-
comes necessary to ascertain what was the authority
vested in Edwin Godwin the administrator, by the
decree entered on the *ex parte* application of the peti-
tioners to carry the law into effect, and the liability
imposed on him. Did he act as a ordinary commis-
sioner appointed by a court in a chancery suit to per-
form some specific duty? Or did he act as an adminis-
trator having an authority derived from, and to be
governed by, the law under which the proceeding was
had? It seems to me the rights and duties of the
administrator are to be deduced from the terms of the
law under which the court was acting, rather than to
be measured by those of a commissioner appointed by
the court as its agent to carry into effect a decree ren-
dered in the exercise of its ordinary jurisdiction. As
administrator he had given bond to administer the per-
sonal assets of the deceased. That would not have
covered the proceeds of this land, to be sold under the
authority of this special act. The court is therefore,
before authorizing a sale, to require a *new* bond of the
administrator. Showing by the expression *new* bond,

that the term "administrator" was not a mere description of the person, but that the authority was given to him in his official character. By the condition of the bond prescribed by the law, he was bound to perform the decree of the court, and account for the proceeds of said sale to the parties entitled thereto, according to the directions of the court.

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It is clear from the condition prescribed, that the law did not contemplate that he was to be a mere agent to sell or to perform some particular duty assigned to him as the agent of the court. It looked not only to his duty to sell, but his authority to collect, and his liability for the proceeds to the parties entitled thereto, according to the directions of the court. He was not to determine between the claims of the widow and devisees. The law provided that the proceeds should pass to the same persons and in the same proportions as the real estate would have passed, had the act never been enacted. Who were the persons entitled and in what proportions, the court was to determine with these parties before it. When the parties were thus ascertained and their proportions fixed, the condition of the bond bound the administrator to pay them. The law provided that the court should have power and authority to authorize the administrator to sell and *convey* the land. In the exercise of the ordinary jurisdiction of a court of equity, one commissioner may be appointed to sell, a second to convey, a third to collect. Here it is manifest the law looked to a sale, conveyance and collection by the administrator, under a special authority given to him in his character as such administrator. He was empowered by law to do what as administrator with the will annexed he could have done if the will had devised the land to be sold by the personal representative. He was to sell on such terms as the court might prescribe, which had reference to the time and place of

1855. sale, credit to be given, security to be required, &c.;
January Term. but did not change or modify the liability incurred by
the condition of the bond.

Corbell's ex'or v. Zeluff & als. The decree conformed to the terms of the act. It authorized him to sell in a prescribe mode, taking from the purchaser three bonds with good security and a deed of trust on the land to secure the payment of the purchase money. The bonds to be payable to the said Edwin Godwin, administrator, &c. and to be returned to the court, and to be subject to their order; reciting also, that the court will proceed at a future day to make further orders disposing of the fund to be raised by the sale of said land.

The decree shows that the court contemplated that the administrator was to convey without further order. It required no report of sale, and did not contemplate any confirmation thereof in order to justify a deed. On the contrary, by requiring a deed of trust on the land to be given by the purchaser, it recognized the right of the administrator to convey as well as to sell, as a right conferred by the law upon giving the bond and being authorized to sell. By directing the bonds to be payable to said Edwin Godwin, administrator, the individual to receive was pointed out to the obligor. The purchaser became no party to any subsequent proceedings in the case. No confirmation of sale being necessary, the decree did not require it, and no such order was made. The decree of the Circuit court recites the fact that a conveyance was made, treats it as a regular transfer of the title, and in this respect has been affirmed.

As soon then as she gave her bonds for the purchase money and received her deed, the purchaser ceased to have any direct connection with the cause in court. She was not bound to enquire whether the bonds were returned to the court, or what disposition was made of them. That portion of the decree directing them to

be returned could not affect the powers of the administrator as conferred by the act. Nor does it, as it seems to me, bear any such construction. The court, in the order, referred to the bonds as the proceeds of the sale, and as synonymous with the fund to be raised by the sale of the land; which fund the order recites the court would at a future day proceed to make a further order disposing of. This was the duty of the court under the act which declared that the proceeds should pass to the same persons and in the same proportions as the real estate would have passed if the act had not been enacted. With this distribution the purchaser had no concern. Having a deed and being authorized to pay to the obligee so as to relieve the land from the incumbrance and discharge her obligations, those entitled to the fund were protected by the condition of his bond to account for the proceeds of the sale. If the bonds had been returned, and upon ascertaining who were the persons entitled to the fund and in what proportions, the court, if such had been the most convenient course, might have directed the bonds to have been assigned by Edwin Godwin to the parties, and a payment to him after notice of such assignment would have been no discharge. Until that or some other measure was taken to prevent his receiving the proceeds, it was the right and duty of the purchaser to pay to the obligee, constituted by the law under which the proceeding was had, a trustee to sell, convey and receive, and to account for the proceeds to those who were entitled thereto. I think therefore the purchaser was justified in making payment to Edwin Godwin whilst he retained the bonds in his possession; and such payments, if made in good faith, operated as a discharge *pro tanto* of the purchase money. No attempt has been made to show that the purchaser was guilty of any fraud; that she knew that Edwin Godwin intended to misapply the funds, or that

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1855. he had any such intention when he received them. It
January Term. does not distinctly appear at what time the first bond
was discharged. The credits on the second bond are
after the bond fell due. The administrator reports
that all but the two bonds returned by him in April
1843, had been paid to him; and in the absence of
any allegation or proof to the contrary, the presump-
tion would be that the payment of the first bond was
not made until it became due. I think that looking
to the authority of Edwin Godwin under this special
act, the payment was valid; and therefore deem it un-
necessary to express any opinion as to the effect of a
payment made under such circumstances to a commis-
sioner appointed to sell by a chancery court in the
exercise of its ordinary jurisdiction. I am for affirming
the decree.

MONCURE and SAMUELS, Js. concurred in the opinion
of ALLEN, J.

DANIEL and LEE, Js. dissented.

DECREE AFFIRMED.

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1. C subscribes his name to his will in the presence of R, who wrote it, and requests R to witness it, who does so. H is then called into the room and requested by C to witness the instrument, and C acknowledges his signature to him, in the presence and hearing of R; and H subscribes his name as a witness in the presence of the testator and of R. HELD:
 1. The acknowledgment of his signature by C was a sufficient acknowledgment of the will.
 2. Though the testator spoke of the paper as an instrument, and did not speak of it as his will to H, yet knowing that it was his will and knowing its contents, it was a sufficient publication of it as his will.
 3. The will was duly executed.
2. The act of 1849, Code, ch. 122, § 4, p. 516, does not change the former law, either as to what shall constitute an acknowledgment, or a publication of the will.*

This was an appeal from the judgment of the Circuit court of Richmond county, affirming the sentence of the County court admitting to probat the will of John Cundiff. The only question in the cause was as to the due execution of the will. The paper was propounded for probat by James T. Yerby, one of the nominated executors, and its probat was opposed by Addison Y. Beane and his wife.

John Cundiff was a bachelor; and requested Richard H. Lyell, a merchant doing business in partnership with his nephew Henry Lyell, at Farnham in the

* The act provides, that "unless" the will "be wholly written by the testator, the signature shall be made or the will acknowledged by him, in the presence of at least two competent witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

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county of Richmond, to make some alterations in his will. Lyell undertook to do it; and a few days afterwards Cundiff came to the place, and in the counting room of Lyell's store, Lyell read to him the paper he had prepared, which Cundiff pronounced correct: At this time there was no other person present but Cundiff and Richard H. Lyell. After the will was read and approved, it was placed on a desk at which Cundiff was seated, and he then and there signed it, and at his request Richard H. Lyell signed it as a witness. This witness then, without leaving the room, called in Henry Lyell from the store room, who found Cundiff sitting at the desk with the will before him. Cundiff, without informing him that the paper was his will, requested him to witness the instrument; and he having first asked Cundiff if he acknowledged his signature to the paper, and having received an affirmative answer, signed it as a witness in the presence of the testator and of Richard H. Lyell; the latter of whom heard the acknowledgment of the signature by Cundiff, and was attending to and supervising the execution of the paper. Another witness, William L. Claybrook, was then called into the room from across the road; and he also attested the paper in the presence of the testator and Richard H. Lyell, though not of Henry Lyell.

Henry Lyell states, that though the testator did not tell him the paper was his will, he believed at the time it was, from what Richard H. Lyell had previously told him. And it appears that at the time he remarked jocularly to the testator, that he wished he had such an old uncle.

The time occupied in the reading of the paper and its execution by the testator and the witnesses, Richard H. Lyell states was between ten and fifteen minutes, during the whole of which time the paper was within the vision of himself and the testator, and the whole was one continued transaction.

R. T. Daniel and Claybrook, for the appellants.
Putton, Gresham and Mayo, for the appellee.

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MONCURE, J. This is an appeal from a sentence of the Circuit court of Richmond county, affirming a sentence of the County court of that county, admitting a paper writing to probat as the will of John Cundiff. The only objection made to the will is that it was not executed and attested in the manner prescribed by the Code, ch. 122, § 4, p. 516. This case is very much like that of *Parramore v. Taylor*, recently decided by this court; except that in this case no question is raised, and it appears none could have been raised, as to the perfect sanity of the testator, and his freedom from any undue influence at the time of the execution of his will. In other respects, the two cases are almost identical. After giving to the able arguments in this case, (and that of *Green & wife, &c. v. Crain, &c.* which involved to some extent the same question, and came on for hearing immediately after this,) all the consideration of which I am capable, I am confirmed in my conviction of the correctness of the views expressed in my opinion in *Parramore v. Taylor*. And regarding that case as a binding authority, I will notice only those particulars in which it was argued by the counsel of the appellant that this case is distinguishable from that.

The principle decided in that case is, that under our present law, a will acknowledged by the testator in the presence of two witnesses, present at the same time, who subscribe their names thereto in his presence, the whole being one continuous transaction, occurring at the same time, is well executed, though the witnesses do not subscribe their names in the presence of each other, and though one of them subscribe his in the order of time before the acknowledgment.

One feature of distinction between the two cases,

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according to the argument of the appellants' counsel, consists in this, that there was not in this case, as there was in that, any concert among the witnesses, any privity between the testator and them, any continuity of transaction, commenced, continued and ended, between the same parties, the testator and the witnesses. That in that case the two witnesses on whose attestation the will was sustained, were convened, for the purpose of being witnesses, before the execution of the will was commenced; while here the scrivener subscribed the will as a witness, and then the other two witnesses were successively called in, and subscribed it as such, not before having had any agency in the transaction, nor knowing that they were to be called in for that purpose. From my recollection of the facts in *Parromore v. Taylor*, there is no material difference in this respect between that case and this. If in that case either of the witnesses to the will or the codicil, except Corbin, had any previous knowledge that he would be called on to witness the transaction, the fact was certainly not relied on as one of the grounds of the opinion delivered, or judgment rendered therein. Nor do I conceive the fact to be of any importance whatever. It is very common and natural for a testator to sign his will in the presence of the scrivener, and after the latter has subscribed his name as a witness, to have other persons, who may be convenient, or be selected by him for the purpose, called in for the first time to witness it. It is not often material to him who are the witnesses, so that they be honest and correct men. But it is generally objectionable to him to have his will written or read in the presence of any person but himself and the scrivener, where one is employed; and therefore the business of writing and reading the will, and of its attestation by the scrivener, when one is employed, is generally completed before any other person is called in to witness it. He does

not often convene the witnesses before hand, and keep them in attendance upon or about him during the whole transaction; especially when, as in this case, he executes his will at a place where he can obtain proper witnesses at any instant he may want them. Richard H. Lyell, the scrivener in this case, was relied on by the testator to have his will duly executed and attested. He was a most important agent in the whole transaction. In no part of it can it be said that he was a silent or unconcerned spectator. His office was not ended when he subscribed the will. He immediately, and without leaving the room, called in the other witnesses successively, and bore witness with them to the acknowledgment made to them respectively by the testator.

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But the main feature of distinction contended for by the appellants' counsel between this case and that of *Parramore v. Taylor*, is, that there the testator acknowledged his will to the witnesses, all of whom knew, from what was said and done at the time, that it was his will. Whereas here, the testator acknowledged his signature merely, to two of the witnesses; and not only did not inform them that the paper was his will, but designedly concealed that fact from them. This difference between the two cases in point of fact, exists in regard to the will in that case; but not, according to my recollection, in regard to the codicil. I do not think, though the record in that case is not before me, that the second witness to the codicil was informed, or had any knowledge, of the name or nature of the instrument when he attested it. I would infer from the opinion delivered in that case that he had not; and at all events, that it was considered of no importance whether he had or not. Nor does it appear that there was any design on the part of the testator in this case to conceal from any of the witnesses to his will, the nature of the instrument. One of them, the scrivener,

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of course knew all about it, and he had informed another of the witnesses, his nephew and partner, that he had been requested to draw the will. It does not appear that any secrecy was enjoined upon him by the testator. Both of the other witnesses believed when they attested the instrument that it was a will; and one of them, it seems, indicated that belief, by a jocular remark made by him at the time. Whether however they were ignorant of the fact or not; or whether it was designedly concealed from them by the testator or not, is, as I shall presently endeavor to show, an immaterial circumstance.

The facts in regard to the attestation of the will by the second witness, Henry Lyell, as stated by himself, are, that he was called from the store room into the counting room by Richard H. Lyell to witness the will. When he went in, the testator was sitting at the desk, with the will, which he had signed, and R. H. Lyell had witnessed, lying on the desk before him or by him. The testator asked him "to witness that instrument of writing." Witness asked him if he acknowledged that to be his signature, meaning the signature to the paper referred to. The testator said, he did. Henry Lyell then subscribed the paper as a witness in the presence of the testator and of R. H. Lyell. The testator did not tell him it was his will, but he believed it was; and had reason so to believe, from what R. H. Lyell had told him. Certainly this would have been a good acknowledgment of the will by the testator to Henry Lyell under the statute of 29 Ch. 2, and our corresponding statute which was in force before the Code took effect. The cases of *White v. The British Museum*, 19 Eng. C. L. R. 91, and *Wright v. Wright*, 20 Id. 197, are conclusive as to the former statute; and the case of *Rosser v. Franklin*, 6 Gratt. 1, as to the latter. The terms and evidence of the acknowledgment were much stronger in this case than in

either of those. In the two English cases none of the witnesses saw the testator's signature, and only one of them knew what the paper was. In the Virginia case, the will was signed by another for the testator, who made her mark, and the only surviving witness was a marksman. It was held not to be necessary that the testator should acknowledge to the witnesses the subscription of his name to be his signature; or even that the instrument is his will. It is enough that he should acknowledge, in their presence, that the act is his, with a knowledge of the contents of the instrument, and with the design that it should be a testamentary disposition of his property. Indeed, the counsel for the appellants admitted that the acknowledgment would have been sufficient in this case under the old law; but they argued that it is not under the new; which requires, as they contended, that the acknowledgment should convey and be intended by the testator to convey, to the minds of the witnesses, a knowledge of the fact that the paper acknowledged is his will; or, at all events, that the witnesses, at the time of their attestation, must have such knowledge; and the testator must be aware that they have. They contended that the report of the revisors, which conformed to the stat. of 1 Vict. ch. 26, § 9, in authorizing the testator's signature to be acknowledged, was amended in the legislature, by requiring the will instead of the signature to be acknowledged by him, for the very purpose of correcting the loose constructions which they supposed had been introduced by those cases and others. I do not think so, but quite the contrary. I think that amendment was made for the purpose of adhering to the old law, and the judicial construction it had received in that respect. The statute of Victoria in requiring the signature to be acknowledged instead of the will, effected, it seems, a material change of the 29 Ch. 2, as it had been ex-

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1855. pounded by the courts. And in construing the former,
January Term. the English ecclesiastical courts have held acknowledgments not to be good which would have been good under the latter. 7 Eng. Ecc. R. 129 and 340.
—
Beane & wife v. I think our legislature designed to avoid the danger of such a consequence; and therefore, by the amendment adopted, employed terms broad enough to embrace every acknowledgment which would have been sufficient under the old law. There was nothing in that law which expressly authorized an acknowledgment of the will by the testator: It spoke of signing only. By judicial construction, an acknowledgment of the signature was held to be equivalent to making the signature in the presence of the witnesses: then an acknowledgment of the instrument as a will, was held to be so equivalent: and then an acknowledgment of the instrument with a knowledge of its contents and an intention on the part of the testator that it should operate as his will, was held to have the same effect, though the witnesses did not know that the instrument was a will. This construction was well settled; and the legislature seems to have designed to embody it in the new statute. In saying that the will may be acknowledged, they used terms which were well understood by the profession and the people, and must have intended them to be so understood. They could not have intended to embrace some forms of acknowledgment and exclude others. An acknowledgment of an instrument which is a will, and known and intended by the testator to operate as such, is an acknowledgment of the will, though not so called by the testator in making the acknowledgment, and though the witnesses be ignorant of the fact that it is a will. If the legislature had designed to make the change as contended for, they would have used plain language for that purpose, such as was used by the legislature of New York in making a similar change. Their lan-

guage was that the testator, at the time of subscribing or acknowledging the will in the presence of the witnesses, shall declare the instrument *to be his last will and testament.* 2 Rev. Stat. 63, § 40. In construing this language, it has been held by the courts of that state, that there must be an actual publication of the instrument *as a will*, in the presence of the subscribing witnesses in addition to the other formalities required by the statute. *Brinkerhoof v. Remsen*, 8 Paige's R. 488; S. C. 26 Wend. R. 325. The difference between the language of our statute and that of New York is very material; and yet it is contended that ours should be construed as that has been. I think that such a construction would extend the words "or the will acknowledged" greatly beyond their proper meaning, the meaning in which they are generally well understood, and would be inconsistent with the other terms and provisions of our statute. The legislature could not have designed, in such an obscure way, to make so radical a change of the law; and not only to make publication necessary as a statutory requisition to the validity of a will, but require it to be made in the presence of the subscribing witnesses.

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It seems to be somewhat doubtful whether publication ever was necessary to the validity of a will. 1 Jarm. on Wills 71. If ever necessary, it might have been inferred from slight circumstances. 3 Lomax Dig. 42, § 24. The statute of 29 Ch. 2 did not require it; but on the contrary, seems to have dispensed with its necessity, if it previously existed; or at least substituted the requisitions thereby prescribed in place of any other publication, in cases to which the statute was applicable. "All other requisitions (says Judge Lomax) would seem necessarily to be excluded, but those which are embraced in the statute; and publication, as a distinct act of the testator, is not one of those which are enumerated." Id. 43. "Signing

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and acknowledgment of a will before witnesses (says Judge Tucker) amount to what is called a publication of the will, although they are not informed that it is a will, and though the testator even calls it a deed." 1 Tuck. Com. pt. 2, 294. "The case of *Trimmer v. Jackson* (says Dr. Burn) was where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will. It was delivered as his act and deed; and the words sealed and delivered were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, as it is said, for the inconveniences that might arise in families from having it known that a person had made his will, that this was a sufficient execution. 4 Burn's Eccl. Law, 8 Lond. ed. by Tyrwhitt, 130." This and other cases on the subject are reviewed in the able opinion of the chancellor in *Brinkerhoof v. Remsen*, 8 Paige's R. 488, from which I have taken the quotation above made from the work of Dr. Burn.

I have said that the construction contended for would be inconsistent with the other terms and provisions of the new law. It would not require publication where the will is wholly written by the testator; nor, though not wholly written by him, if the signature be made (instead of the will acknowledged) in the presence of the witnesses. Why is not publication as necessary in those cases, and especially the latter, as in a case in which the will is acknowledged? Can it be believed that the legislature intended to permit a testator who can and chooses to write his own will, or sign it in the presence of the witnesses, to conceal from them the fact that it is a will, and even to execute it in the form of a deed for that purpose; and yet to require a testator who cannot write, or who happens not to make his signature in the presence of

the witnesses, to declare to them that the instrument is his will? Surely, if the legislature had intended to require publication at all, the requisition would have been uniform, and applied to all cases in which the reason for its application is the same. That is the case in the statute of New York, which requires publication as well where the signature is made, as where it is acknowledged in the presence of the witnesses. There the publication is a statutory ingredient in the execution of the will, entirely independent of the act of making or acknowledging the signature, and must co-exist with that act, whether it be in one form or the other. Here the publication contended for would not be an independent, necessary ingredient in the execution of the will, but be a mere alternative, or substitute, for the act of making the signature in the presence of the witnesses. The most natural alternative for such an act would be the acknowledgment of the signature; and that is what the revisors proposed. But the legislature authorized the will to be acknowledged; and thus, I think, made any acknowledgment valid which would have been so, under the construction which had been put upon the old law. Therefore, the acknowledgment of the instrument, and *a fortiori*, of the signature, though the witnesses be not informed of the name or nature of the instrument, is sufficient; if the testator himself knows its contents, and intends that it shall be a testamentary disposition of his property. In this case, both the instrument and the signature were acknowledged by the testator; and that he knew its contents, and intended it to operate as a testamentary disposition of his property, is conclusively proved by the draftsman of the will and one of the subscribing witnesses thereto.

The construction contended for would, I think, greatly increase litigation, and produce much mischief without any corresponding good. The perplexing

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question in all cases of acknowledgment of a will would be, whether what was said or done by the testator amounted to an acknowledgment. Too much would depend upon the loose recollection of the witnesses; and the danger of their being tampered with, and of the will being thus defeated, would be greatly increased. The evils of increased litigation and confusion, arising from a change of the will law, are signally displayed in regard to a provision in the statute of Victoria, requiring the will to be signed "at the foot or end thereof by the testator." An immense number of cases have been before the English courts, involving the construction of these words. Our legislature wisely avoided the evil by adhering to the old law, and merely embodied in the new statute the judicial construction of that law, by requiring the will to be signed "in such manner as to make it manifest that the name is intended as a signature." There have been cases also before the English courts, involving the construction of the words of the statute of Victoria, requiring the *signature* to be acknowledged. Our legislature has, I think, in like manner avoided this evil by requiring the *will* to be acknowledged.

In conclusion, this is a case in which a man, having no family, wished to give his estate to some of his collateral kindred; and made his will for that purpose. He was of perfectly sound mind, and free from any undue influence at the time of its execution; and dictated and understood the contents of it. The scrivener and the witnesses were men of unimpeached integrity, having no interest of their own to subserve, and no motive, so far as the record shows, for favoring or disappointing any of the expectants upon the testator's bounty. He acknowledged his signature to the will in the presence of at least two witnesses, present at the same time, who subscribed their names thereto in his presence. If this will be not valid, the law has, in

this instance, signally failed in its intended effect, to secure a free and fair exercise of the testamentary right. But I am of opinion that it is valid, and I am therefore for affirming the sentence of the Circuit court.

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ALLEN, P. I dissented from the majority of the court in the case of *Parramore v. Taylor*, and agreed with Judge DANIEL in the opinion given by him in *Sturdivant v. Birchett*, 10 Gratt. 67. Upon the question decided in *Parramore v. Taylor*, I have seen no reason to change my opinion. But that case was fully argued and carefully considered. The decision was made by a majority of the whole court, and a motion for a rehearing was overruled. The same question has been again argued in this case, and with the same result. I must therefore consider it as settling the law on that question in future cases. Upon the other question presented in this case, whether an acknowledgment of the signature is a sufficient acknowledgment of the will under our statute, I concur in the opinion of the majority.

LEE and SAMUELS, Js. concurred in the opinion of **MONCURE, J.**

DANIEL, J. dissented.

JUDGMENT AFFIRMED.

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GREEN & als. v. CRAIN & als.

March 6.

1. A paper prepared as the will of C, is read to him by the scrivener, and approved; and then the scrivener, at the request of C, subscribes C's name to the paper, and by like request he attests it; and no other witness attests it in the presence of this one. About three days after C acknowledges the paper as his will in the presence of H, who at his request, attests it in his presence. No other witness attests the paper on that day; but about four days after, H is again at the house of C with W, when C requests W to attest the paper, which W does in the presence of H and C, and C then acknowledges the paper as his will in the presence of H and W. HELD: The will is duly executed.
2. In this case a motion to instruct the jury assumes all the facts stated by the subscribing witnesses as true, and asks the court to instruct the jury that the paper is not proved to be the will of C, according to the statute. The instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them; and therefore is not objectionable.

This was a suit in equity in the Circuit court of Pittsylvania county, instituted by Laban Green and others, heirs and distributees of John T. Crain deceased, to set aside a paper which had been admitted to probat as the will of said Crain. The defendants were his devisees and the administrator with the will annexed. The court directed an issue *devisavit vel non.*

On the trial the contestants moved the court for an instruction to the jury, which was refused, and they excepted: and there was a verdict in favor of the will. The exception sets out the will, to which there were three subscribing witnesses, all of whom were examined on the trial. The first, Thomas W. Walton, proved that he wrote the said paper at the request of the testator, who approved it; and that he signed the

testator's name at his request, and also at his request subscribed it as a witness in his presence; the testator then acknowledging it as his will. That this was done on the 5th of May 1852; and that no other witness attested the paper in the presence of this witness.

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The second witness, John M. Hutchings, proved that about the 8th of May 1852, the testator acknowledged the paper to be his will in the presence of the witness, and requested him to subscribe his name as a witness, which was done in the presence of the testator. That no other witness attested the paper on that day; but that about four days after the witness had attested the paper, he was at the house of the testator in company with John D. Wright. That the testator, in the presence of the witness, requested Wright to subscribe his name to the paper as a witness, and that Wright did so subscribe his name in the presence of the witness and the testator: And that the testator did then, in the presence of both Wright and the witness, acknowledge the paper to be his will. The testimony of Wright as to what occurred when he attested the paper, was the same as that of the witness Hutchings. All the witnesses proved that the testator was of sound mind and disposing memory.

These being all the facts proved on the trial, the contestants by their counsel, moved the court to instruct the jury, that the said paper writing was not proved to be the last will and testament of John T. Crain according to the statute; because no two of the subscribing witnesses were present together with the testator when Walton subscribed his name as a witness; because no two of the subscribing witnesses were present together with the testator when Hutchings subscribed his name as a witness; because no two of the subscribing witnesses were present together with the testator when he directed and authorized Walton to sign his name to said will, the same being

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proved only by the said Walton, no other witness knowing any thing of such authority being given further than his subsequent acknowledgment as aforesaid of said will in the presence of said Hutchings and Wright; because no two of the subscribing witnesses proved that either Walton or Hutchings subscribed their names in the testator's presence.

As before stated, the court refused to give the instruction, and the contestants excepted.

Upon the return of the verdict to the Chancery court, that court dismissed the bill: And thereupon the contestants applied to this court for an appeal, which was allowed.

Bouldin, for the appellants.

Robinson, for the appellees.

SAMUELS, J. In the argument here it was insisted that the motion to instruct the jury was properly overruled, for reasons apart from the proposition of law submitted for the judgment of the court; that the instruction, if given, would have been an invasion of the province belonging to the jury. If the record showed this to be true, then the motion was properly overruled, without regard to any other reason. This court, in *Kincheloe v. Tracewells*, 11 Gratt. 587, and in *Harvey v. Epes*, *supra* 153, decided that the courts might decide upon such motions by parties just as they were made, and were under no legal necessity of sifting or modifying such motions, so as to separate and withhold the erroneous portions from the jury. I am of opinion, however, there is no foundation for the objection. It appears that after all the evidence had been heard by the jury, the contestants submitted to the court the motion for an instruction to the jury. This motion did not ask of the court an expression of opinion in regard to facts proved, or the weight of

evidence. The contestants admitting the absolute verity of every thing which the evidence tended to prove, yet insisted that the proof was insufficient to prove the will; that conceding all the witnesses had said to be true, yet as it was not proved that any two of the witnesses had subscribed the will in the presence of each other, the proof of execution was not sufficient in law. There was no proof tending to show such subscription by the witnesses, (in fact it was disproved,) and upon this absence of proof the contestants predicated their motion to instruct. It would have been idle to submit it to the jury in the usual form to pass on the sufficiency of evidence to prove a subscription by two witnesses in the presence of each other, when there was no proof whatever having a tendency to that end.

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A court is not bound to decide questions of law, on a trial by jury, unless they be relevant to the case before it; such questions are relevant only when they arise upon the evidence. A bill of exceptions is intended for the sole purpose of putting upon the record the facts upon which a party rests his proposition of law, the proposition itself, and the decision of the court thereupon. It has been frequently decided by this court that the facts upon which a legal proposition is predicated must be shown by the record; if it were otherwise, cases might be decided upon abstract questions having no existence in such cases. A bill of exceptions to a ruling by the court in the progress of the trial is well taken, if it show that there was something in the evidence to serve as a basis for the proposition of law, the proposition itself, and the decision of the court. It is usual to state the tendency of the evidence, leaving its sufficiency to be passed on by the jury. If however the exceptor admits in advance the existence of every fact which the proof tends to show, and puts his admission in the bill of exceptions which

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he tenders, it is difficult to perceive why he may not do so. On facts thus stated the appellate court can determine whether the question of law did arise with as much certainty as if they had been stated in any other mode. In the case before, it appears from the facts stated, that no two of the witnesses subscribed the will in the presence of each other. On this the contestants below, the appellants here, moved for an instruction to the jury to the effect that the will was not well executed. This instruction the court refused to give; and this decision is brought here for revision.

The facts in the record, so far as the witness Walton is concerned, are of no weight on the question whether the will was executed in the form prescribed by law: he was not in the presence of the testator at any time when any other witness was present. The case must therefore rest upon the facts with which the witnesses Hutchings and Wright are connected. The witness Hutchings, on or about the 8th day of May 1852, heard the testator acknowledge the will, and thereupon, in the presence of the testator, subscribed his name as a witness. The requisitions of the law up to this point had not been complied with. About four days afterwards, on or about the 12th of May 1852, the testator again acknowledged the will in the presence of the witnesses Hutchings and Wright, and Wright subscribed his name as a witness in the presence of the testator and of the witness Hutchings: the witness last named did not again subscribe the will. Thus the precise question passed on by the Circuit court was presented, and is, whether it was necessary that the subscription by each witness should be made in the presence of the other. The Circuit court held it was *not* necessary; and in this I think the court decided correctly. I am led to this conclusion as well by looking to the terms of the statute as to its obvious purpose and intention. It requires of the testator

himself, that "the signature shall be made, or the will acknowledged by him, in the presence of at least two competent witnesses present at the same time." This requisition, construed as it should be, with reference to former laws of which our statute is a revision, means that the relation of "presence" shall exist between the testator and the witnesses, and does not require that the relation of "presence" should exist between the witnesses themselves. It is easy to conceive how witnesses might both be in the "presence" of the testator, and yet not in the presence of each other, if we give the word "presence" the meaning heretofore affixed to it by judicial decisions. *Shircs v. Glasscock*, 2 Salk. R. 688; *S. C. Carthew* 81; *Davy v. Smith*, 3 Salk. R. 395; *Casson v. Dade*, 1 Bro. C. C. 99; *Neil v. Neil*, 1 Leigh 6.

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The English courts, in passing on the statute 1 Victoria, ch. 26, § 9, from which our statute is taken, have decided that the witnesses must not only be in presence of the testator at the time he makes his signature or acknowledgment, but in the presence of each other. This is not the necessary meaning of the terms used; for as already said, the witnesses might both be in the presence of the testator, yet not in the presence of each other. To hold that the witnesses must not only be in the presence of the testator, but also in the presence of each other, will impose upon the courts of probat the double duty of deciding on these double relations; thus complicating the proofs, and thereby increasing the danger of defeating the testator's intention; and this because, as is said, it should be inferred that the witnesses must be in the presence of each other from the fact that they are required to be in the presence of the testator.

If we look to the obvious purposes of the statute, there is little room for doubt. The will must be in writing; the law makers having deemed it unwise to

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rely on parol testimony touching the disposition of property by will. After the will is written, it is required that the testator shall manifest his approval of its provisions by signing his name, or causing it to be done. The signature by the testator performs a double function; first to show his approbation of what is written, and next to identify the paper. The office of the witnesses is to identify the paper, to prove the signature or acknowledgment thereof when it shall thereafter be offered for probat. The law prescribes as the only mode of identification, that the witnesses subscribe their names in the presence of the testator, so that he may know the witnesses are subscribing the paper which he intends to be his will. All these purposes of the statute are secured by the construction of the Circuit court: It neither sacrifices the end to the means, nor the means to the end. That the testator in this case intended the paper propounded to be his will; that he acknowledged it as such in presence of Hutchings and Wright; that Hutchings in testator's presence subscribed the paper; that Wright in presence of Hutchings and of testator subscribed his name, are all facts beyond question: yet it is said that the will is defectively executed because Hutchings did not subscribe in presence of Wright as well as of testator. This, as I have already said, is not required by the letter of the statute. It is argued, however, that each witness should observe the act of subscription by the other as a security against fraud and forgery. Before yielding to this argument, it is well to consider whether the same security is not afforded by the construction put on the statute by the Circuit court. Under either construction, fraud or forgery could be made effective only by the perjury of two subscribing witnesses. They must prove, either truly or falsely, that testator put his signature to or acknowledged the paper as his will; if truly so proved, no in-

jury is done to any one; if falsely proved, it can only be deplored as one of the many abuses which may be practiced in giving testimony. It will do no good to place the honest execution of wills under arbitrary and capricious restrictions for the purpose of preventing the perpetration of fraud and forgery by means of perjury, seeing that fraud, forgery and perjury may attain their ends just as readily as if the restrictions had never been imposed. At last, it will be found that the only security against evil practices exists in the vigilance of the testator and the integrity of witnesses. If knaves shall combine to establish a spurious will, their work will be just as easy under one construction as under the other.

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The general principles involved in this case were considered in the case of *Parramore v. Taylor*, 11 Gratt. 220; and *Beane v. Yerby*, *supra* 239, recently decided by this court; and it is unnecessary to go over the same ground. I therefore only refer to those decisions and the cases cited by Judge MONCURE in *Parramore v. Taylor*, especially to *Pollock v. Glassell*, 2 Gratt. 439; *Rosser v. Franklin*, 6 Gratt. 1; *Moore v. Moore's ex'or*, 8 Gratt. 307; *Sturdivant v. Burchett*, 10 Gratt. 67; as giving the rule by which this case must be decided.

I am of opinion to affirm the decree.

MONCURE and LEE, Js. concurred in the opinion of SAMUELS, J.

ALLEN, P. and DANIEL, J. dissented.

DECREE AFFIRMED.

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CUSTIS v. SNEAD & als.

March 10.

1. Upon a bill for partition of land, as a general rule, the share of each parcener should be assigned to him in severalty. And if from the condition of the subject or the parties, it is proper to pursue a different course, the facts justifying a departure from the rule should, at least where infants are concerned, be disclosed by the report or otherwise appear, to enable the court to judge whether or not their interest will be injuriously affected.
2. Where the same parties are entitled to lands derived from the father and also to lands derived from the mother, and some or all of them are infants, if these lands are blended in the division, it must appear to the court that the interest of the parties in general will be promoted by this mode of partition, to enable the court to protect the rights of the infants.
3. Where the widow of the person who died seized of the lands of which partition is sought, is alive, and entitled to dower, she should be a party to the suit, and her dower should be assigned to her, and partition made of the residue. And it is error to proceed in her absence, and make partition of the lands subject to her right of dower.

This was a bill filed in November 1842 in the County court of Accomack, by Lewis J. Snead and Thomas Custis, for partition of a tract of land descended to the children and heirs of Malinda Custis, of whom Thomas Custis was one, and had sold his share to Snead. It also prayed partition of a tract of land and slaves descended to the children and heirs of William Custis of Henry. William Custis was the husband of Malinda, and their children were the heirs of both. After their death one of these children died an infant, intestate and unmarried, and his interest in both estates descended to the other children; all of whom were infants when the bill was filed except Thomas Custis. The bill stated that the second wife

of William Custis survived him, and was then married to James Stewart; but they were not made parties to the suit; and the prayer was for a partition of the two tracts of land and the slaves.

At the same term of the court a decree was made appointing commissioners to divide: First, the land descended from Malinda Custis, equally amongst the plaintiff Snead and the infant defendants: Second, the slaves equally amongst the plaintiff Thomas Custis and the defendants: Third, the land descended from William Custis of Henry, equally amongst Thomas Custis and the infant defendants. And they were directed to report their proceedings to the court.

In October 1843 the commissioners reported that they had divided the slaves according to the decree. That they had laid off and allotted to the plaintiff Snead one-fifth of the land descended from Malinda Custis: And that they had delayed to divide the land descended from William Custis, at the request of one of the parties, who desired to have a rehearing of the decree.

In October 1846, the plaintiffs filed an amended and supplemental bill, in which, after stating the previous proceedings, they say that Snead had purchased Thomas Custis' interest in the land descended from William Custis of Henry, and also the interest of the defendant Elizabeth Custis in the land descended from Malinda Custis. And they ask that both tracts of land may be divided, giving to Snead another fifth of the first named tract, as assignee of Elizabeth Custis, and one-fifth of the second tract as assignee of Thomas Custis; and that the other parties may each have his fifth allotted to him.

The cause came on again to be heard in October 1846, when the court confirmed the report of October 1843, and appointed the same commissioners, with directions to divide the land descended from Malinda

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Custis, except the fifth, which had been allotted to Snead, and also, the land descended from William Custis of Henry, amongst the plaintiff Snead and the infant defendants.

In November 1846, the commissioners reported that they had assigned to Snead the whole undivided balance of the land descended from Malinda Custis, in full of his interest in both tracts; and that they had assigned to Elizabeth Custis and the three infant defendants the tract descended from William Custis of Henry, which they had divided equally among the four.

Benjamin F. Custis, one of the defendants, having attained the age of twenty-one years, he in October 1851 filed his affidavit in the cause, in which he expressed his belief that the division made by the commissioners was unequal in favor of Snead. And in December he excepted to the report of 1846, on the ground that they did not obey the directions of the decree of October 1846, but had assigned the whole of the land descended from Malinda Custis to the plaintiff Snead: And that this land was far more valuable than Snead's interest in the other tract.

The cause came on to be finally heard in December 1851, when the court overruled the exceptions, and confirmed the report: And thereupon Benjamin F. Custis applied to this court for an appeal, which was allowed.

R. T. Daniel, for the appellant.

Patton, for the appellee.

ALLEN, P. delivered the opinion of the court:

The court is of opinion, that as in a proceeding at law by writ of partition, it is the regular course to assign to each parcener his part in severalty; Litt. § 276, Coke 179 b; from analogy thereto, the same

course should, as a general rule, be observed where the proceeding is by bill in chancery. That such partition of the whole subject is more likely to be equal and just than where a partial partition is made, as the commissioners will have an accurate view of the whole subject, and by dividing it into different parts, will be furnished with the means of making a fair comparison, and can correct inequalities. If from the condition of the subject or the parties, the interest of the parties in general would, in any case, be promoted by pursuing a different course, the facts justifying a departure from the rule should, at least where the rights of infants are involved, be disclosed by the report, or otherwise appear, to enable the court to judge whether their interests would be affected injuriously or not.

The interlocutory decree of the 28th of November 1842 directed the commissioners, amongst other things, to divide equally amongst the plaintiff and the defendants who were infants, the tract of land of which Malinda Custis died seized. Instead of pursuing the directions of said decree, the commissioners, by their report filed the 30th October 1843, assigned to the appellee Lewis J. Snead one-fifth of said tract of land; leaving the residue thereof undivided.

The court is of opinion, that in this the commissioners violated their duty, and, in the absence of all evidence to justify it, it was error to confirm the report aforesaid in this respect.

The court is further of opinion, that the same objection exists to the report of the commissioners under the decree of the 26th October 1846. The said decree requiring a division of both the tract descended from Malinda Custis and the tract whereof William Custis of Henry died seized, separately amongst the parties according to their rights, the decree should have been followed and carried out according to its terms, unless the interest of all concerned required a departure from

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1855. the terms thereof; and if so, the facts should have
January Term. been reported or made to appear, to enable the court,
Curtis having a regard to the interests of the infants, to judge
v. whether such departure should have been permitted.
Snead That although under the 4th section of the act con-
& als. cerning partitions, 1 Rev. Code of 1819, p. 360, parti-
tion may be made of several parcels of land or other
real estate to which the parties have title, though such
title may be derived from different sources, by allot-
ment of part in each parcel or of parts in one or more
parcels, or of one or more individual parts, with or
without the addition of a part or parts of other parcels,
as shall be most for the interest of the parties in gene-
ral; yet where the same parties are entitled to lands
derived from the father and also to lands derived from
the mother, and some or all are infants, as in the event
of the infant dying under age, a different course of de-
scent is prescribed, inconvenience might result from
blending such lands in the partition; and it should at
least appear in the words of the act, that the interest
of the parties in general would be promoted, to enable
the court to protect the rights of the infants. Nothing
of that kind appearing either in the report of the com-
missioners or otherwise, the court is of opinion it was
error to overrule the exception and confirm said report
filed on the 30th November 1846.

The court is further of opinion, that as it is alleged in
the original bill that said William Custis of Henry left
a widow who at the time of filing said bill was the wife
of James Stewart, and the bill prayed for a partition
of the land of which said William died seized, subject
to the widow's estate in dower, the widow and her
husband should have been made parties; and her dower
assigned; and partition should have been made of the
residue. And it was error to have directed or con-
firmed a partition of said tract until such dower had
been assigned; it not appearing, and there being no-

thing to justify the court in presuming, that such estate in dower had terminated. It is therefore ordered and adjudged, that so much of said decrees as is herein declared to be erroneous, be reversed, and the residue thereof be affirmed; and that the appellee L. J. Snead, pay to the appellant his costs. And the cause is remanded, with instructions to require the appellees to make said widow and her husband parties, if such dower estate is still in existence; and for further proceedings, in order to a partition of said lands, in order to a final decree.

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DECREE REVERSED.

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DELANEY v. GODDIN.

April 17.

1. The County court passing upon any question under the act, Code, ch. 37, § 15, is vested with no judicial power, but acts in a capacity purely ministerial: And in determining whether or not it will order the report of the surveyor therein required, to be recorded, is restricted to the consideration of objections to said report; and has no right to look beyond the return of the list of sales by the sheriff, required by § 11 of said chapter.*
2. In such case it is the duty of the court to see whether said report is in conformity with the provisions of said section, requiring it to specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and to give such other description of the land sold as will identify the same. And in order to discharge that duty, no enquiry into the regularity or validity of the previous proceedings is necessary or proper.
3. In such a case, upon a motion by the purchaser to order the report of the surveyor to be recorded, the County court, not acting judicially, has no authority to render a judgment overruling the motion with costs.
4. If the County court renders such a judgment, upon appeal to the Circuit court, that court should simply reverse the judgment with costs; but should not proceed to order that the report of the surveyor should be recorded: The error of the County court in refusing to order the report to be recorded, can only be corrected by *mandamus*; and not by writ of error or *supersedeas*.

At the March term 1853 of the County court of Henrico, Isaac A. Goddin moved the court to record the report of the surveyor of the county in relation to a lot of land sold by the sheriff for the nonpayment of the tax upon it. The lot was sold as the property of Matthew Delaney; and he appeared and opposed the motion. The court overruled the motion, and gave Delaney a judgment against Goddin for his costs. And thereupon Goddin excepted.

* See the opinion of Judge DANIEL for the statute.

On the hearing of the motion Goddin showed by the list of delinquents on the land tax in the county of Henrico for the year 1847, that lot No. 8 in L. E. Harvie's plan, which was assessed with a tax of ten cents, was returned delinquent as owned by Matthew Delaney. And he presented a list of lands and lots returned as delinquent in the county of Henrico for the years from 1845 to 1849, inclusive, certified by the auditor of public accounts to the sheriff of said county in June 1850, in which was this lot of Delaney, as delinquent for the year 1847, for the tax of ten cents, with interest one cent. And he proved by the deputy sheriffs that this list had been received from the auditor; and that within twenty days thereafter, three copies thereof had been made; one of which had been set up at the court-house, and at two other of the most public places in the county, with a notice that the sale of the lands mentioned in the lists would take place on the first day of the next October court for said county. That the said sale was commenced on the day appointed, but that the court sitting only one day, and the sale not being completed, it was adjourned to the first day of the next County court; on which day it was completed. And that notice of such adjournment was posted, and proclamation thereof made, at the door of the court-house of said county on the said October court day. And the advertisement of the sale and of the adjournment were introduced in evidence, the first of which bore date the 25th of July 1850.

He also introduced a list of real estate within the county of Henrico, sold in the months of October and November, for the nonpayment of taxes thereon for the years from 1845 to 1849, inclusive, which list was verified by the oath of the sheriff of Henrico, and certified by the County court to the auditor of public accounts, in the manner prescribed by law; which

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list contained the said lot as owned by Delaney. And he also introduced the receipt of the sheriff, which was headed: Memorandum of real estate in the county of Henrico, sold this 7th day of October 1850 for non-payment of taxes due thereon for the year 1847; and recited the name of the person charged with the tax; quantity of land; local description of land; amount of tax due; quantity of land charged; name of purchaser; and amount of purchase money: And at the foot a receipt for the purchase money, which was thirty-seven cents.

He then introduced the report of the surveyor, which was as follows:

Henrico County, to wit:

I certify that the above named lot No. 8, of L. E. Harvie's plan, lies in Henrico county, near the city of Richmond. Said lot is on the east side of Belvidere street, and is bounded on the north and south by property of Charles Dimmock, and east by the property of William Row. Given under my hand this 15th day of December 1852.

JOSEPH J. PLEASANTS,
Sur. Henrico County.

Delaney on his part, proved that in 1847 he lived in the city of Richmond, and owned a considerable amount of personal property; one witness said as much as two thousand dollars in value. And he proved that he paid to the sheriff of Henrico the tax on another lot in the county in the year 1847.

The County court having overruled his motion with costs, Goddin applied to the Circuit court of Henrico for a *supersedeas* to the judgment, which was awarded: And when the cause came on to be heard in that court, the judgment of the County court was reversed, with costs. And the court proceeding to make such order

as the Court court should have made, ordered that the said report be recorded; and for this purpose that the cause be sent back to the said County court. From this order Delaney applied to this court for a *supersedeas*, which was awarded..

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The case was elaborately argued by *Gilmer, G. N. Johnson* and *Patton*, for the appellant; and by *Howard, Randolph* and *Stanard*, for the appellee.

The counsel for the appellant insisted that the act to be performed by the County court upon the motion to order the report of the surveyor to be recorded, was a judicial act; and that it was the duty of the court to look into all the previous proceedings to see whether they were regular; and if they were not, to refuse to order the report to be recorded. And they insisted that there were fatal irregularities in the previous proceedings.

The counsel for the appellee insisted that the act to be performed by the court, was a ministerial act; and that the enquiry was limited to the single question, whether the report of the surveyor conformed to the law. And they insisted further that there were no irregularities in the previous proceedings, which, if they could be looked to by the court, could justify a refusal to order the report to be recorded.

DANIEL, J. This case turns on the proper construction of the 15th section of the 37th chapter of the Code, prescribing the mode in which lands, returned delinquent for taxes, are sold therefor, or vested in the commonwealth. Preceding sections of the chapter having declared when, where and how land is to be sold for taxes, and provided for a payment of the purchase money and a receipt therefor, and for the return of a list of sales to the court of the county or corporation whose officer may have made the sales; and

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having also pointed out the time and mode for the redemption of any land so sold, the 14th section provides that the purchaser of a part of any tract so sold and not redeemed within two years, shall have the quantity purchased surveyed and laid off, the survey to commence on either of the lines of the tract at the option of the purchaser, so as not to include the improvements on the same, (if it can be avoided,) and to be in one body, the length whereof shall not be more than double the breadth, when that is practicable. It further provides that a plat and certificate of the survey shall be returned to the court of the county; and if the court, upon examination thereof, find it to be correctly made in conformity with said fourteenth section, it shall order the same to be recorded.

And the fifteenth section provides that when an entire tract of land is so sold, and not redeemed within the two years, the purchaser shall have a report made by the surveyor of the county to the court thereof, specifying the metes and bounds of the land sold, and the names of the owners of the adjoining tracts; and giving such further description of the land sold as will identify the same; and the County court, unless it see some objection to such report, shall order the same to be recorded.

And the sixteenth section then provides that after the expiration of the two years, the purchaser of the land so sold and not redeemed shall obtain from the clerk or deputy clerk of the court of the county or corporation, whose officer may have sold such land, a deed conveying the same, in which shall be set forth all the circumstances appearing in the clerk's office in relation to the sale. Moreover if the sale be of part of a tract of land, the deed shall refer particularly to the plat and certificate of survey returned, according to the fourteenth section, and the order of the court thereupon; and if the sale be of an entire tract of

land, it shall refer to the report made according to the fifteenth section, and the order thereupon. If the sale be of a town lot, or of an undivided interest in such lot, and a report be made by a surveyor describing the same, and such report be ordered by the court to be recorded, the deed shall refer to the said report. But when in the case of a sale of a town lot or of an undivided interest in such lot there is no such report, the clerk shall nevertheless execute a deed therefor to the purchaser, if he desire the same.

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Can there be any reasonable doubt as to the nature and extent of the duty to be performed by the County court under the fourteenth section? After pointing out how the survey is to be made, and requiring a plat and certificate of it to be returned to the court, the section, in plain and unambiguous terms, limits the enquiry of the court to the question whether or no the survey is correctly made in conformity with said section. Does the plat and certificate show that the survey commences on one of the lines of the tract sold? Is it so made as not to include the improvements? Is it in one body? Is the length no more than double the breadth? If so, then the condition, the only condition on which the order for the record of the survey is in terms made to depend, is satisfied, and the duty of the court to make the order becomes absolute.

The duty of the court under the fifteenth section is, I think, equally simple and obvious. "Unless it see some objection to *such report*," it is to order it to be recorded. Does the report specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and give such further description of the land sold as will identify the same? If in any case arising under this section these questions are answered affirmatively, what possible objection can the court see to *the report*? And how can it make

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ing the ground for refusing to record the report, without violating the express command requiring it to order the report to be recorded, unless it sees some objection; not some objection generally, but some objection to *the report*?

The meaning of the terms employed in the section seems to my mind too plain to admit of any doubt as to the answer to be given. And indeed we cannot convert the examination by the court of the survey under the 14th section, or of the order under the 15th, into an occasion for contesting and deciding upon the regularity and validity of the previous proceedings, without imputing to the legislature a gross partiality and injustice. For we have seen that by the provisions of the 16th section, when the sale is of part of a tract of land, the deed is to refer particularly to the plat and certificate of survey returned, and when the sale is of the entire tract, the deed is to refer to the report required by the 15th section. Whereas in the case of the sale of a town lot, the provision is, that *if there be a report* made by a surveyor describing it, and the report has been recorded, the deed is to refer to such report; but if there is no such report, the clerk shall nevertheless execute a deed for such lot to the purchaser, if he desire it. And thus as the purchaser may procure his deed, in the case of the sale of a town lot, without having had any survey or report made, the opportunity for showing defect in the previous proceedings, which under the construction contended for by the plaintiff in error is afforded in all cases to the owners of tracts and parts of tracts of land sold for taxes, is virtually denied to the owners of town lots so sold, by being made to depend on the mere option and course of the purchaser. Such a construction, therefore, is condemned as well by the results which flow from it as by the plain meaning of the language

employed in the statute. And I feel no difficulty in coming to the conclusion that in cases like the one under consideration, the County court has no right to look beyond the return of the list of sales by the sheriff, and to examine into the regularity of the previous steps. No matter what such steps may have been or how conducted, they can have no bearing on the simple duty it is called upon to discharge. The duty is in no wise judicial, but purely ministerial. *Rex v. Justices of Derbyshire*, 1 Wm. Black. 606; *Dawson v. Thruston*, 2 Hen. & Munf. 132; *Manns v. Givens*, 7 Leigh 689. And upon the authority of these cases, I think it also clear that the means of testing the correctness of the action of the County court in refusing to record the report, is not by writ of error or *superseideas*, but by *mandamus*. So much of the judgment of the Circuit court, therefore, as passes on the refusal of the County court to order the report to be recorded, is erroneous. The Circuit court ought simply to have reversed the judgment of the County court dismissing the motion, and ordering the payment of costs, leaving the defendant in error free to renew his application to the County court to have the report recorded, or to take such other course as he may be advised to pursue in the premises.

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ALLEN, P. dissented from so much of the opinion and judgment as held that in this case the action of the County court was to be treated as merely ministerial. The power was confided to a court of record, and the action of the court was judicial; the parties appeared and litigated the question; the court has affirmed its jurisdiction by pronouncing judgment which would conclude the parties until reversed; and therefore it was proper for the Circuit court to review and if erroneous to reverse it. He was further of opinion that the authority of the County court, al-

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though the court acted judicially, was limited to the enquiry whether the report of the surveyor conformed to the requisitions of the law; and that it was not competent for such court, upon this enquiry, to require proof of the regularity of the proceedings leading to or attending the sale. He was further of opinion that the survey did conform to the requisitions of the law, and was therefore for affirming the judgment of the Circuit court reversing the judgment of the County court, and proceeding to enter the judgment it did.

LEE and SAMUELS, Js. concurred in the opinion of DANIEL, J.

MONCURE, J. concurred with ALLEN, J.

The order was as follows:

The court is of the opinion that the County court, in passing upon any question arising under the 15th section of the 37th chapter of the Code of 1849, prescribing the mode in which lands returned delinquent for taxes are sold therefor or vested in the commonwealth, sits simply as a court of registry; and in determining whether or no it will order the report of the surveyor, therein required to be recorded, is restricted to the consideration of objections to said report, and has no right to look beyond the return of the list of sales by the sheriff required by the eleventh section of said chapter, into the previous proceedings provided for in said chapter. That the said court in discharging its duty under the said 15th section, is vested with no judicial powers, but acts in a capacity purely ministerial; that it is its duty to see whether or no said report is in conformity with the provisions of said section, requiring the report to specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts; and to give such

other description of the land sold as will identify the same; and that in order to discharge this duty, no enquiry into the regularity or validity of the previous proceedings is necessary or proper. And if it sees that there is no objection to said report on the score of its failing to make the specifications or to give the description just mentioned, it becomes the imperative duty of said court to order said report to be recorded.

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The court is, therefore, also further of opinion, that the County court had no authority to render the judgment of the 14th of March 1853, dismissing the motion of the defendant in error, and ordering him to pay costs to the plaintiff in error.

And the court is also further of opinion, that whether or no there was such objection to the report of the survey in the proceedings mentioned, as justified the County court in refusing to order the same to be recorded, is a question which it was not competent for the Superior court to take cognizance of by means of writ of error or *supersedas*; and that the propriety of the action of the County court in refusing to order said report to be recorded, can be tested in the superior court by *mandamus* only.

And the court is therefore also further of opinion that the Circuit court erred in undertaking to decide on the refusal of the County court to order said report to be recorded, and in rendering a judgment ordering the same to be recorded: And that instead of rendering its said judgment of the 20th July, 1854, the Circuit court ought simply to have rendered a judgment reversing, with costs to defendant in error, the judgment of the County court dismissing his motion, and ordering him to pay costs.

It is therefore considered, that so much of the said judgment of the Circuit court as reverses the said judgment of the County court, with costs to the defendant in error, be affirmed; and that so much thereof

1855. as orders the report aforesaid to be recorded, be reversed and annulled. And that the said plaintiff in error recover against the said defendant in error his costs by him expended in the prosecution of his writ of *supersedeas* aforesaid here. And the said defendant in error is at liberty to renew his application before the County court, or to take such other legal course as he may be advised to pursue in the premises. All which is to be certified, &c.

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1. In ejectment, it being proved that an ancestor of the plaintiff lived upon the land, evidence that he was generally considered the owner, or that the witness so considered him, is incompetent and inadmissible.
2. The clerk's office of a County court, with all the records therein, having been consumed by fire, a paper purporting to be an official copy of a will of record in that office, and to be certified by a former clerk of the court, is admitted to record under the act of February 19, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate, but by another person, who was not authorized to make the certificate, is inadmissible in a collateral action.*

This was an action of ejectment in the Circuit court of Gloucester county, brought by Skaife W. Pryor against Philip Taliaferro, and upon his death revived against his heirs. The plaintiff claimed as only child and heir of John C. Pryor, who was the son of Christopher Pryor. The land which was the subject of the action is a tract of three hundred acres, called "The Ware-house." On the trial the plaintiff introduced a witness, James Jones, who stated on his direct examination, that he was well acquainted with the land; and also that he was well acquainted with Christopher Pryor as early as the year 1792 or 1793. That Christopher Pryor resided on the said place called "The Ware-house," from the time the witness first became acquainted with him until his death in 1803; but that he did not know whether or not he was the owner of

* See the statute quoted in the opinion of MONCURE, J.

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said land. That after Christopher Pryor's death his widow continued to reside on the land as long as she lived. That after her death one Captain Harwood and Willis Perrin resided on the land; but that the witness did not know whether or not they owned it. The witness was then asked by the plaintiff's counsel, whether the said Christopher Pryor, at the time of residing on said land, was generally reputed to be the owner of the land? To this question the defendants objected; but the court allowed it to be put; and the witness answered, that he did not know whether the said Christopher Pryor was generally reputed to be the owner of said land, but that the witness considered him to be so. Thereupon the defendants objected to the said answer going in evidence to the jury; but the court overruled the objection: And the defendants excepted as well to the opinion of the court authorizing the question to be put, as to that admitting the answer as evidence.

The plaintiff then introduced another witness, William G. Wiatt, who stated that he knew the land, and Christopher Pryor. That from his first acquaintance with Pryor, which was three or four years before his death, he lived on the land, and that he died in 1803 on the land. The plaintiff then asked the witness the same question he had put to the witness Jones; which was objected to by the defendants, but allowed by the court. Whereupon the witness answered, that he did not know whether Christopher Pryor was the owner or not of said land; but that the witness so regarded him, and believed he was generally considered to be the owner of said land. To this answer the defendants also objected; but the court overruled the objection: And the defendants again excepted.

The plaintiff further proved that the clerk's office of Gloucester County court, together with all the records thereof, was destroyed by fire in the year 1820. And

he further proved that John C. Pryor was the son of Christopher Pryor, and that the plaintiff was the only son of John C. Pryor, who died about four years previous to the trial of the cause. He then offered in evidence a paper purporting to be an official copy of the will of Christopher Pryor. This paper had annexed to it a certificate of its admission to probat in the County court of Gloucester on the 4th of April 1803, to which is signed the name of "*Thomas Nelson, C. C.*"; and the paper and certificate are subscribed, "*A copy—Teste, Thomas Nelson, C. C.*" To this paper the following certificate was annexed:

"This copy of the last will and testament of Christopher Pryor deceased, duly authenticated and attested by Thomas Nelson, a former clerk of this court, was, on the 14th day of April 1846, produced to the clerk of the County court of Gloucester; and it appearing that the record thereof has been destroyed by fire in the clerk's office the same is admitted to record, upon the application of Christopher Pryor, guardian of Skaife W. Pryor.

Teste, JOHN R. CARY, *C. C.*"

The paper offered was an official copy of the will and the certificates thereon, certified by Cary, as clerk of the court. The reading of this paper in evidence was objected to by the defendants; and in support of their objection, they proposed to prove by Cary the clerk, that the paper was admitted to record in his office on the 14th of April 1846, without any other evidence of the genuineness of said copy, and of the due attestation thereof, and of Thomas Nelson's being the clerk of the County court of Gloucester, than was furnished by said copy itself on its face; and that he had no personal knowledge of any of the facts himself. And they further proposed to prove that neither the copy of the will, nor the certificate of the probat, nor the attestation thereof, nor the signature of *Thomas*

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Nelson, C. C. subscribed to said certificate, was in the handwriting of said Thomas Nelson; but that the whole will, certificate, attestation and name were in the handwriting of one George W. Camp, who was a copyist at one time in the office of the clerk of Gloucester County court; and never either the clerk or deputy clerk of said County court. But the court excluded the evidence offered by the defendants, and overruled their motion to exclude the paper, and admitted the same as evidence: And the defendants again excepted.

After the foregoing proceedings had occurred, and all the evidence had been introduced, the court, upon the motion of the plaintiff, instructed the jury, that the said copy of the copy of Christopher Pryor's will, read in evidence to the jury by the plaintiff as aforesaid, should be regarded and received by them as evidence of the will of said Pryor, and as evidence of the contents of said Christopher Pryor's will; and to be regarded by them in the same manner that they would regard the original will as evidence if that were introduced instead of a copy. To the giving of this instruction the defendants again excepted. There was another exception, which it is unnecessary to state.

There was a verdict and judgment for the plaintiff; and the defendants applied to this court for a *superse-
deas*, which was awarded.

Griswold, for the appellants, insisted:

1st. That the evidence of the witnesses Jones and Wiatt, as to the reputation of Christopher Pryor's ownership of land, was illegal. That the general rule was against the admission of evidence of reputation; and that this case did not come within any of the exceptions to that rule. And he referred to 1 Starkie on Evi. 32, 33; *Doe v. Thomas*, 14 East's R. 323; and *Morewood v. Wood*, in a note to that case, 327; *Out-*

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ram v. Moorewood, 5 T. R. 121; *Mima Queen v. Hepburn*, 7 Cranch's R. 290; *Ellicott v. Pearl*, 10 Peters' R. 412, 434-35; *Gregory v. Baugh*, 4 Rand. 611; *Masters v. Varner*, 5 Gratt. 168.

2nd. That the admission of the copy of the will to record by the clerk was not conclusive of the question whether it was a duly certified copy of the will. That it had been frequently held by this court that the copy of a paper improperly recorded, was not evidence. *Turner v. Stip*, 1 Wash. 319; *Currie v. Donald*, 2 Wash. 58; *Maxwell v. Light*, 1 Call 117; *Givens v. Manns*, 6 Munf. 191; *Peterman v. Laws*, 6 Leigh 523; *Pollard's heirs v. Lively*, 2 Gratt. 216. That until the act of 1840, Sess. Acts, 1839-40, ch. 55, § 2, p. 47, there was no provision by which a paper which had been destroyed could be rescued and recorded; and that this act provides that the original paper or a duly attested copy may be recorded. That the clerk was not a judge to decide whether the paper was duly attested; a fact which in many cases he could not know. But his business was to record the paper, leaving the question whether it was a paper which the law authorized to be recorded, open as in the cases above cited, to be determined when it should arise between parties interested to enquire into it.

R. T. Daniel, for the appellee, said:

That as to the first question made by the appellants' counsel, it did not arise, as the witnesses stated that they knew nothing on the subject to which the enquiry related: And therefore the asking the question could not have injured the appellants. And he referred to *Preston v. Harrey*, 2 Hen. & Munf. 55; *Faulcon v. Harris*, Id. 550. But that the question had regard to the possession, which was a matter complicated of law and fact, and it was a mere mode of sifting the character of the possession. He referred

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to Judge Baldwin's opinion in *Taylor v. Burnsides*, 1 Gratt. 165, 190; and *Overton v. Darisson*, Id. 211; *Clapp v. Bromaghan*, 9 Cow. R. 530; *Jackson v. Joy*, 9 John. R. 102.

On the second point, he insisted that the act of the clerk in admitting the copy of the will to record was conclusive in this collateral action. That the clerk was authorized to perform a probat act: That it was a part of his duty to ascertain whether the paper offered to him was a duly attested copy of a lost original paper; and having done so, his act cannot be questioned elsewhere. *Harkins v. Forsyth*, 11 Leigh 294; *Carper v. McDowell*, 5 Gratt. 212.

MONCURE, J. The questions presented by the first and second bills of exception in this case, are as to the admissibility of general reputation, and of the individual opinions of witnesses, to prove the title of Christopher Pryor, under whom the defendant in error claims the land in controversy.

It is a general rule that hearsay evidence is inadmissible. It is also a general rule that the opinions of witnesses are not admissible evidence. There are certain well defined exceptions to each of these general rules; but it is needless to state them. They may be seen by reference to 1 Stark. Evi. p. 30-35, and 153, 4; and 1 Greenl. Evi. § 440. It is sufficient to say that this case falls under the general rules aforesaid, and not under any of the exceptions to them. Therefore, the Circuit court erred in overruling the objections of the plaintiffs in error to the questions and answers mentioned in the first and second bills of exception. See *Doe v. Thomas*, 14 East's R. 323; *Mima Queen v. Hepburn*, 7 Cranch's R. 290; *Ellicott v. Pearl*, 10 Peters' R. 412.

The questions presented by the third bill of exceptions are, as to the admissibility of the paper purport-

ing to be an official copy of the will of Christopher Pryor; and of the testimony offered by the plaintiffs in error in resistance of the reading of the said paper in evidence to the jury.

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The clerk's office of Gloucester County court, with all the records thereof, was destroyed by fire in 1820. The paper in question is an official copy of a paper which was recorded in that county on the 14th of April 1846, in pursuance of the second section of the act passed February 19, 1840, entitled "an act concerning the preservation of records;" which declares, "that if the deed book containing the record of any conveyance, will, testament or other writing, or papers which may lawfully be recorded in any court of this commonwealth, or containing the record of any suit, judgment, decree or order of any court, be stolen, destroyed or mutilated, it shall be lawful for the clerk of such court, upon the production to him of the original writing so recorded, or a copy thereof duly attested, or a copy of any such record, judgment, decree or order duly attested, to record the same again upon the application of any person who may require it to be done, and to charge to such person the same fee as may have been chargeable for recording the same in the first instance. Every such record shall state whether it was made from the original writing or a copy thereof, and also the form of its authentication or attestation; and thereupon the conveyance, will, judgment, decree, order or other writing so recorded, shall be held and taken to be duly recorded, and the record thereof, or a copy of the same, shall in like manner have the same effect as the original record thereof in the book stolen, destroyed or mutilated, or a copy thereof would have been entitled to."

The paper in question appears on its face to be in strict conformity with the statute in all respects; and there can be no doubt but that it is admissible evi-

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dence. The only question is, whether the evidence offered to show that the paper admitted to record as aforesaid, was not in fact duly attested, is admissible evidence. I am of opinion that it is not.

The object of the statute is to reinstate, as far as possible, a destroyed record; to provide something which shall be equivalent to that which is destroyed. Where the record of a deed or will has been destroyed, and the original, or a copy of the deed or will duly attested, is in existence, there is no difficulty in attaining this object: and the legislature has therefore provided that the clerk of the court whose record is destroyed, shall record the deed or will again, upon the production to him of such original or copy; and that thereupon the deed or will shall be held and taken to be duly recorded, and the record thereof, or a copy of the same, shall in like manner have the same effect as the original record thereof, or a copy of it would have been entitled to. The paper so produced to the clerk for record must appear on its face to be duly attested; and to show whether it is or not, the statute cautiously provides, that "every such record shall state whether it was made from the original writing, or a copy thereof, and also the form of its authentication or attestation."

If the paper does not appear on its face to be duly attested, the clerk has no power to admit it to record, and his act in so doing is void. But if it does appear on its face to be duly attested, the statute confers on him the power to admit it to record, and charges him with the duty of deciding whether or not the attestation be genuine. This duty, it is true, is *quasi judicial* in its nature; but it is not unlike many other duties with which he is chargeable; and the legislature reasonably supposed that he would know whether his own attestation, or that of one of his predecessors in office, was genuine; and that, being a sworn public officer,

bound by bond with surety for the faithful discharge of the duties of his office, he might safely be intrusted with the performance of this duty. He can easily ascertain, and it is his duty to ascertain, if he does not already know, whether the person whose name is signed to the certificate of probat was clerk of the court at the date of the certificate, and whether the signature was made by such clerk, or by his authority; and the law gives him credit for a proper discharge of this duty. His decision in favor of the genuineness of the attestation is final and conclusive; at least in any collateral proceeding in which the record or a copy of it may be given in evidence. This, I think, is the necessary construction of the statute, and results from the nature of the act which it authorizes the clerk to perform. Evils and inconveniences may sometimes, perhaps, result from it; but not so great as would result from a different construction. The object of the record is to give notice to the world, and to afford permanent evidence for the benefit of all persons concerned. If, though regular and legal on its face, it could at any distance of time and in any collateral proceeding be impeached by evidence *aliunde*, it would be of little or no value, but would occasion surprise, and be a fruitful source of injury. In a proper case for relief it may be obtained by a suit in equity, or perhaps by an action on the official bond of the clerk. *Horsley v. Garth*, 2 Gratt. 471, was considered a proper case for equitable relief.

Under the law which existed on the subject when the statute of 1840 was passed, (1 Rev. Code 1819, p. 516,) the clerk could not record a paper of which the original record was destroyed, without a previous order of the court of which he was clerk. Upon the court devolved the judicial duty, if it may be so called, of deciding upon the genuineness of the attestation; and upon the clerk the merely ministerial duty of

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spreading the paper again upon the record book, if so ordered by the court. There could be no doubt, I presume, of the finality and conclusiveness of an order of probat under that law, in the absence of any appearance of irregularity on the face of the proceedings. The statute of 1840 substitutes the clerk to the place of the court; and devolves on him the judicial as well as the ministerial duty. The legislature could not have intended that a probat under that statute should have less force and effect than under the pre-existing law.

The construction I have put upon the statute is not only in accordance with its literal terms and obvious intention, but also, I think, with the well settled principles of the law of evidence, as laid down by the elementary writers. In the case of *The King v. Hopper*, 3 Price's R. 495, it was unanimously decided by the Court of exchequer, that the enrollment of a deed of bargain and sale by a clerk under the statute of enrollments, 27 Hen. 8, is itself a record, against the verity of which there can be no averment. Indeed the difficulty, if any, in that case seemed to be whether the date was a part of the enrollment; the statute not expressly requiring that it should have a date. The court decided that it was.

But without looking elsewhere for authority on this subject, the cases of *Harkins v. Forsyth*, 11 Leigh 294, and *Carper v. McDowell*, 5 Gratt. 212, seem to be conclusive of the question.

In *Harkins v. Forsyth* it was held that the certificate of justices, pursuant to the directions of the statute, of the privy examination of a *feme covert*, is conclusive in a collateral proceeding, and evidence to prove that the deed was not fully explained to her, is inadmissible. The observations of Tucker, P. in that case (in which the other judges concurred) are very applicable to this.

In *Carper v. McDowell*, the only opinion delivered

was that of Judge Baldwin, in which it does not expressly appear that the other judges concurred. It is only stated that they concurred in the decree; and it cannot therefore be known on what particular grounds they respectively based their judgment. Judge Baldwin placed his upon the ground that the certificate of a clerk of the acknowledgment of a deed in his office by the parties thereto, is conclusive, and cannot be impeached by extrinsic evidence, in a collateral proceeding, that the deed was in fact acknowledged out of the office. He was of opinion that the registration of a deed under our law is the exercise of a probat jurisdiction. "It follows (he says) from the nature and purposes of such a jurisdiction, that though its proceedings are often and most generally *ex parte*, yet that when perfected they are evidence for and against the whole world; that they cannot be impeached by extrinsic evidence in collateral controversies concerning the rights to property; and that as a general rule they cannot be so impeached even directly in a suit instituted for the very purpose. If this were otherwise, the obvious result would be to defeat, in a great measure, the objects of the probat jurisdiction, and to introduce much uncertainty and confusion into the administration of justice."—"It is immaterial whether the probat jurisdiction be vested in a court or a commissioner, in a judicial or a ministerial officer, in a tribunal established or an officer appointed for the sole purpose of its exercise, or in tribunals or officers established or appointed for other purposes."—"The registration itself, when completed, and appearing upon its face to have been had conformably to law, is the final act of an exclusive jurisdiction, designed to establish amongst all persons, and in all time, the very matter which extrinsic evidence would draw into question."—"The degree of credit due to this record evidence does not depend upon the question, whether

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this or that part of it, or the whole of it taken together, is to be considered as a judicial or as a ministerial act; but upon the consideration that it is an institute of the law, for purposes of a general, public and permanent interest, which cannot be otherwise accomplished."

These observations of the learned judge are as applicable to this case as to that in which they were made; and if they are sound, as I think they are, they put an end to the question I am now considering.

The counsel for the plaintiffs in error argued that the two cases last referred to, only decided that the certificates of the justices and clerk were conclusive of the facts certified; so that it could not be denied, in the former case, that the wife had been privily examined by the justices, nor in the latter that the deed had been acknowledged in the clerk's office: whereas in this case, there is no question as to the truth of the fact certified by the clerk in his certificate of the admission of the paper to record as a copy of the will of Christopher Pryor. I think the evidence offered and excluded plainly tended to contradict the certificate; and so was inadmissible, on the principle of the two cases referred to. The certificate is that the copy of the last will and testament of Christopher Pryor to which it is annexed, was duly authenticated and attested by Thomas Nelson, a former clerk of the court. The evidence offered and excluded tended to show that the said copy was not duly authenticated and attested by Thomas Nelson, a former clerk of the court. Here is an express denial of an important fact certified by the clerk who admitted the copy to record. His certificate is at least as conclusive of that fact as the certificate of the justices and clerk were conclusive of the facts of privy examination and acknowledgment in the two cases referred to. It can surely make no difference that the facts certified in those cases depended on the personal knowledge of the justices and clerk; and

the fact certified in this case was a conclusion of the judgment of the clerk from the evidence produced before him. This would be to place the certificate of a fact known to be false, on higher ground than the certificate of a fact believed to be true; to make a ministerial act conclusive, and a judicial one not so.

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The same counsel further argued that, according to several cases decided by this court, which he cited, a paper acquires no validity from recordation unless it be properly recorded; and that the evidence offered and excluded tended to show that the paper in this case was not properly recorded. The answer to this argument has, in effect, been already given. It is that the certificate of probat, which is conclusive in a collateral proceeding such as this is, shows that the paper was properly recorded.

I think there is nothing in the foregoing opinion inconsistent with the case of *Johnston & wife v. Slater*, 11 Gratt. 321. It was there decided that a husband is not a competent witness, within the meaning of the registry acts, to prove the execution of a deed to his wife; and that evidence of the fact of his being her husband, is admissible, in a collateral proceeding, to avoid the registration. Nothing was said in the opinion, nor I believe in the argument in that case, about the effect of the registration as a probat proceeding. It was contended in the argument that the object of registration is to give notice; and that that object is equally well attained, whether the witnesses be competent or incompetent. This view was sustained by two cases cited from the North Carolina Reports, viz: *Jones' lessee v. Ruffin*, 3 Dev. R. 404; *McKinnon v. McLean*, 2 Dev. & Bat. 79, Law Reports. But this court was of opinion that as, under our law and the decisions upon it, the record of a deed duly recorded, or an official copy thereof, is primary evidence, not only of the registration but of the deed itself, in any

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controversy; the witnesses by whom the deed is proved for record must be competent, on the same principle on which a witness by whom a deed is proved on the trial of a cause must be competent. It was considered that the deed in that case was not duly recorded; that it was in fact proved by but two witnesses instead of three, as the law then required; the husband of the grantee being in effect no witness. If the certificate of probat had shown that the deed was proved by only two witnesses, it would not have been legally recorded. *Maxwell v. Light*, 1 Call 117. So, if it had shown that the third witness was the husband of the grantee, and therefore incompetent. It did show that a person who in fact was the husband of the grantee was one of the three witnesses who proved the deed. And evidence *aliunde* of that fact was not inconsistent with the certificate, and was therefore admissible. The evidence showed that the deed was not legally recorded; that the case was, as it were, *coram non judice*. In this case the evidence offered and excluded was in conflict with the certificate of probat upon a fact which was within the cognizance of the clerk, and as to which his certificate is conclusive.

I am of opinion that the Circuit court did not err in giving the instruction mentioned in the fourth bill of exceptions. This follows as a necessary consequence from what I have already said.

It is unnecessary to express any opinion upon the question presented by the fifth and last bill of exceptions, as it is not likely to arise in any future trial of the case.

I think the judgment should be reversed, with costs to the plaintiffs in error, the verdict set aside, and the case remanded for a new trial to be had therein.

SAMUELS, J. concurred in the opinion of MONCURE, J.

LEE, J. was disposed to affirm the judgment throughout; but yielded to the views of the other judges, and concurred in the opinion of MONCURE, J. 1855.
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ALLEN, P. and DANIEL, J. dissented from the opinion of MONCURE, J. to the extent to which it goes as to the conclusiveness of the certificate of the clerk.

JUDGMENT REVERSED.

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1. By an ordinance of the city of Wheeling, a license to keep a house of entertainment is to expire and be of no further effect on the 1st day of May next succeeding the date thereof. The council having in April granted such a license for the succeeding year, such grant did not vest in the party to whom it was granted, any absolute or vested right to such license; but the right did not become perfect until the actual emanation of the license, or until the first day of May following.
2. By the same ordinance the council has authority at any time to annul a license actually issued under its order. *A fortiori* it may rescind an order granting a license before the 1st of May, which has not issued.
3. A party to whom such license was granted in April cannot properly apply for a *mandamus* to compel the proper officer to issue it, before the 1st of May; and therefore the pendency of such a *mandamus* cannot affect the right of the council to rescind the order granting the license, before that time.
4. The council being authorized by the charter of the city to assess a tax on licenses to keep ordinaries, in addition to the state tax, it was competent for the council to make the payment of the tax a condition precedent to the emanation of the license.
5. The council having by an ordinance assessed a tax on a license to keep an ordinary, and having granted the license "under existing rates of taxation," such grant must be taken to refer to not only the state tax, but the tax imposed by the council; and to require the payment of the latter as the condition of the right to call for the license.
6. In such case, though the tax was unequal, oppressive and illegal, yet as its payment was a condition precedent to the emanation of the license, without the performance of the condition nothing passed under the grant: And the condition cannot be separated from the grant and disregard, so as to render the grant absolute and unconditional: The whole must be taken together, and accepted or rejected.
7. By the charter of the city the council has power to refuse a license to keep an ordinary; and if the tax laid is unjust, excessive and illegal, it is in effect the exercise of this power, and for all legal purposes should be so regarded. And the

- exercise of this power cannot be controlled by the Circuit court by *mandamus* or otherwise: But the charter authorizing a party to whom a license is refused, to apply to the County court of Ohio for it, his only remedy is to apply to that court.
8. The order granting the license having been made in April, if the tax then imposed was illegal, or if no tax had been assessed upon it at the time, it was competent for the council, at any time before the 1st of May, to modify its grant by requiring the payment of a legal tax in lieu of that which was illegal, or to supply the omission to lay a tax upon ordinaries: And without the payment of this tax at least, the party to whom the license had been granted, had no right to demand it.
9. Upon a *mandamus nisi* sued out by the party to whom the license was granted by the council, against the officer whose duty it is to issue the license, he may in his return set up the ordinance passed since the order granting the license, imposing a tax upon it.
10. In a case of this kind a *mandamus nisi* may be issued in the first instance, without a previous rule upon the party to appear and show cause against it.

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On the 19th of April 1854, Z. S. & J. J. Yarnall presented a petition to the judge of the Circuit court of Ohio county for a *mandamus* to George W. Sights, clerk of the city of Wheeling, to compel him to issue to them a license to keep an ordinary at the "Sprigg house" in said city. A *mandamus nisi* was issued, returnable to the first of May following; at which time Sights made his return, setting out the various statutes of the state and ordinances of the city bearing upon the question; and the action of the city council in relation to the license to the petitioners to keep the said ordinary. The case, as it appears from the petition and the return to the *mandamus*, is as follows:

The act to incorporate the city of Wheeling, passed the 11th of March 1836, vests in the council the usual powers to make ordinances for the regulation of their proceedings, and for the transaction of their business, and also for the appointment of such officers as they may deem necessary for the execution of the powers

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vested in the city or council. And by another act passed March 4th, 1854, it was enacted that the council "shall have exclusive authority within said city to grant or refuse license to the keepers of ordinaries, inns and taverns, houses of public or private entertainment, boarding-houses, public eating-houses, coffee-houses, places at which spirituous liquors shall be sold, and places of public amusement."

"They shall further have authority to regulate the manner in which such houses or places shall be kept and to levy and collect taxes thereon, in addition to any tax which is or shall be payable on the same to the state. But if the council shall upon application refuse to grant any such license to keep an ordinary, a license to keep the same may be obtained from the County court of Ohio county, upon application thereto, as in other cases of ordinaries in said county." It is the last clause of the act which was added in March 1854.

By an ordinance of the council passed May 2d, 1840, it is ordained, "If the council shall order license to be granted upon any application, the applicant shall pay to the treasurer of the city the tax, if any, imposed on such license by the ordinances of the city, and to the officers authorized by law to receive the same, the tax, if any, due thereon to the state; and shall take proper receipts therefor, and shall deliver the same to the clerk of the city. And further, if bond be necessary, shall deliver to the clerk the proper bond executed by himself and the security or securities named in his application or required by the council, and shall pay to the clerk the proper fee, whereupon the clerk shall issue license according to the order of council."

By another section of this ordinance it is required that before any license to keep an ordinary shall be issued by the clerk of the city, the applicant shall enter into a bond of a prescribed form, with the secu-

rity named in his application or prescribed by the council. And by another section of said ordinance, all licenses for ordinaries and houses of private entertainment shall expire and be of no effect on the first Monday of May next succeeding the date thereof; but it shall be lawful for the council, at any time, to annul any license so issued, and shall return a ratable proportion of the tax.

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By an ordinance passed on the 14th of March 1854, supplementary to one passed on the 14th of February preceding, assessing taxes for the city of Wheeling for the year 1854, it was ordained:

1st. That there shall be paid to the treasurer of the city, on every license to keep an ordinary within said city, the following tax, viz:

For a license for an ordinary to be kept at the house called the "Sprigg house," the tax shall be four thousand five hundred dollars *per annum*.

For a license for an ordinary to be kept at the house called the "McClure house," the tax shall be three thousand dollars *per annum*.

For a license for an ordinary to be kept at any other house within said city, the tax shall be two thousand dollars *per annum*. There were other provisions which need not be stated.

The council having been advised that there was doubt whether the foregoing ordinance of the 14th of March was constitutional and valid, on the 28th of April passed an ordinance to amend it. By this ordinance a tax according to the rental was laid upon ordinaries: and for the highest class it was provided, that if the annual rental value exceeded one thousand dollars, there should be a tax of three hundred and eighty dollars on the first one thousand dollars, and twenty-five *per cent.* on the excess; provided the tax on every such license should not exceed one thousand and five dollars.

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On the 11th of April 1854, Z. S. & J. J. Yarnall applied in writing to the council for a license to keep an ordinary for one year from the first Monday of the next May at the place in the city of Wheeling called the "Sprigg house:" And they named their securities in their petition. And on the same day the council made an order granting them the license as asked for, under existing rates of taxation: And it was certified that the petitioners were persons of good moral character, and not addicted to drunkenness or gaming.

By one of the ordinances of the city it was provided that the journal of the proceedings of the council shall be read and approved by the council, shall be signed by the presiding officer and countersigned by the clerk, and shall then only have the proper force and effect. And the proceedings of the meeting at which the license was granted to the Yarnalls was not so approved and signed until the 24th of April; at which time it was among other things ordered, that the order made at the last meeting of the council granting license to Z. S. & J. J. Yarnall for an ordinary to be kept at the "Sprigg house," be and the same is repealed. Previous to this meeting of the council the Yarnalls had applied to the judge for the *mandamus*, and a *mandamus nisi* had been directed.

It appears that the petitioners had previously kept an ordinary at the "Sprigg house;" that they had executed the bond required by the ordinance in the prescribed form, with the securities mentioned in their petition; that they had paid the tax due to the state, and delivered both the receipt and the bond to the clerk of the city. It also appears that previous to the ordinance of March 14th, 1854, the tax upon ordinaries was ratable according to the rental, and that the highest tax upon any ordinary had been two hundred and fifty-eight dollars; that on the "Sprigg house" for the year 1853 was about one hundred and seventy

dollars, when as the petitioners insisted the rental value of the house was as great as it was in 1854. They insisted that the ordinance of March 14th, 1854, was unconstitutional and void, and that there was no tax assessed by the council on ordinaries.

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Sights, the clerk of the city, objected to the issue of a *mandamus*, on the grounds:

1st. That the grant of the license having been made expressly subject to the payment of the tax assessed by the ordinance of March 14th, 1854, the petitioners were only entitled to the license upon the terms upon which it was given. And if the condition was invalid, the grant itself was also invalid.

2d. That the order granting the license was of no effect until the proceedings were approved and signed. And at the meeting at which that was done, the order was rescinded.

3d. That the license asked for was for the year commencing the first Monday in May 1854, and could not be issued before that time. There were other objections taken, which need not be stated.

Upon the hearing a peremptory *mandamus* was directed to issue to Sights, the clerk of the city of Wheeling, commanding him as such clerk forthwith to make, issue and deliver to Z. S. & J. J. Yarnall a license to keep an ordinary at the place called the "Sprigg house," for the license year extending from the first Monday in May 1854 to the first Monday in May 1855. From this order Sights applied to this court for a *supersedeas*, which was allowed.

Fry, for the appellant.

Russell, for the appellees.

Lee, J. delivered the opinion of the court:

The court is of opinion, that as by the ordinances of the city of Wheeling, the annual license granted by

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the council for ordinaries and houses of entertainment was to expire and be of no further effect on the first Monday of May succeeding the date thereof, it was manifestly contemplated and intended that such license should issue and bear date on or after the first day of May in any year, and not before: and that the act of the council in entertaining the application of the defendants in error and passing the order of the 11th of April 1854, for granting them a license for an ordinary under the existing rates of taxation, must be regarded as voluntary and for convenience only, and not compulsory or binding beyond recall upon the said council; and that the said order did not confer upon the defendants in error any perfect, absolute or vested right to such license, but a right which was incomplete and inchoate only; and which would not become perfect and consummate until the actual emanation of the license, or until the time at which it might lawfully be issued and take effect, to wit, the 1st day of May 1854.

And the court is further of opinion, that as by the same section of said ordinance, power was expressly reserved to the council at any time to annul a license which had actually issued under its order, *a fortiori* it would possess the power to rescind an order for granting such license made prior to the 1st of May in any year, at any time before the actual emanation of the license, or before the 1st day of May next after the date of such order.

The court is therefore of opinion, that it was competent for the council prior to the 1st of May 1854 to repeal and rescind its order of the 11th of April 1854 granting a license for the year following to the defendants in error: that its right so to repeal and rescind the same was to be taken and considered as an incident to and constituting a part of said grant, and that its order to that effect, passed on the 24th of April 1854, was a valid and effectual repeal of the said order of the

11th of April 1854, and put an end to all right on the part of the defendants in error thereafter to demand that the said license should be issued to them.

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And the court is further of opinion, that the right of the council to rescind the order of the 11th of April 1854 granting the license, was not affected or impaired by the pendency of the application to the judge of the Circuit court of Ohio county for a *mandamus* to compel the issuing of the license; because the right to the same under the order of the council of the 11th of April 1854 being imperfect and inchoate only, the application for the *mandamus* could not regularly be entertained until the time at which the license might be issued and take effect, and could not therefore, until such time, have the effect to destroy or abridge the control which the council would otherwise have over the subject, or the right to modify, amend or rescind the order as to it might seem just and proper.

And the court is further of opinion, that the council being authorized by the charter of the city of Wheeling to impose a tax upon ordinaries, &c. in addition to any state tax that might be levied upon the same, was fully authorized to make the payment of such tax a condition precedent to the right to demand the emanation of the license: and that by the ordinance of the 2d of May 1840 the said council have required that payment of the tax imposed by them should be made before the applicant would be entitled to demand that the license should be issued.

And the court is further of opinion, that the council having by its ordinance of the 14th of March 1854 levied the sum of four thousand five hundred dollars as the tax to be paid for a license for an ordinary to be kept at the house of the defendants in error, and having by its order of the 14th of April 1854 granted such license to the defendants "under existing rates of taxation," such grant must be taken to have reference

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not only to the state tax imposed by law upon licenses to ordinaries, but also to such tax so levied by the council as aforesaid; and to have required payment of the latter also as the condition of the right to call for the emanation of the license.

And the court is further of opinion, that whether the tax imposed by the supplementary ordinance of the 14th of March 1854 was just, fair and reasonable, or was unequal, excessive and illegal, is a question not material to be determined in this cause; because whether the one or the other, payment of the same was required to be made by way of condition precedent to the emanation of the license; and without the performance of such condition, nothing passed under the grant of the said license; nor could such condition be separated from the grant and disregarded, so as to render the grant absolute and unconditional: but the whole must be taken together and must be accepted or rejected in whole as it stands.

And the court is further of opinion, that if the said tax so levied by the said ordinance of the 14th of March 1854, was unjust, excessive and illegal, the grant of the license, on payment of such unjust, excessive and illegal tax, was in effect the exercise of the power reserved to the council by the thirty-fifth section of the charter of the 11th March 1836, to refuse the license, and for all legal purposes should be so regarded and treated; but that the exercise of the discretion conferred by said section in refusing to grant the license could not be the subject of review in the Circuit court upon *mandamus* or otherwise; and that to obtain such license the remedy remaining to the applicants was that given by the act of March the 4th, 1854, by a resort to the County court of Ohio county, as prescribed by said act.

And the court is further of opinion, that as the council had at least until the 1st of May 1854, full

control over the order of the 11th of April 1854, and the right wholly to revoke and rescind the same, so if the tax imposed by the ordinance of the 14th of March 1854 was unjust, excessive and illegal, or if in point of fact no tax had been imposed on ordinaries by any ordinance of the said council, it was competent to the council to modify its grant of the 11th of April 1854, at any time before the period above indicated, by requiring payment of a valid and legal tax upon the same in lieu of that imposed by the act of the 14th of March 1854, or to supply the omission to lay a tax upon ordinaries; and that consequently the ordinance of the 28th of April 1854 amending the previous ordinances assessing taxes for the city of Wheeling, and imposing taxes on ordinaries, was valid and operative upon all licenses to be issued on or after the 1st day of May, and applied equally to that which had been granted to the defendants by the order made before its enactment; and that without payment of the tax imposed by this ordinance at least, the said defendants, if otherwise entitled, could not demand that the license should be issued and delivered to them.

And the court is further of opinion, that the said ordinance of the 28th of April 1854 and the ground of defense which it suggests is sufficiently presented by the return made by the plaintiff in error upon the writ of *mandamus nisi*, and that the same properly might and should have been looked to and considered by the Circuit court in passing upon the question of a peremptory *mandamus*.

And the court is further of opinion, that from the materials afforded by the record in this case, it cannot undertake to say that the tax imposed by the said ordinance of the 28th of April 1854 was unjust, unequal and exorbitant, nor that the exercise of the discretion vested in the said council as to the amount of the tax to be levied on ordinaries, was undue, improper or oppressive.

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And the court is further of opinion, that there was no irregularity in awarding the *mandamus nisi* in the first instance without any previous rule upon the party to appear and show cause against the same.

Wherefore, and without deciding any other question raised in the cause than those upon which the opinion of the court is above declared, the court is of opinion, that the return made upon the said writ of *mandamus nisi* is sufficient; that the judgment of the said Circuit court is erroneous, and should be reversed, with costs to the plaintiff in error; that the motion for the peremptory *mandamus* should be overruled, and the *mandamus nisi* discharged; and that the plaintiff in error should recover his costs in the Circuit court expended.

Richmond.

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Absent ALLEN, P.

April 23.

1. A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.
2. A board of directors of a bank consists of seven; and they are all present. Upon a vote for president but five vote, three of whom vote for Y, and two for B, who had been president the year previous. Under the belief that it required a majority of the whole number to elect, they postpone the election; and B continues to act as president. At a subsequent meeting they proceed again to the election, when Y receives the three votes he had received at the former meeting, and votes for himself; making a majority of the whole number; B receives the two votes he had received before, and he votes for S. Whereupon Y is declared to be duly elected; and he proceeds to act as president. Upon an application by B for a *mandamus* to restore him to the office: HELD: by two of the judges, that Y was duly elected on the first day; and whether or not he accepted the office, B had no right to it after that time. One judge held that Y not then having insisted on it, it was no election; but that he might vote for himself, and therefore he was duly elected on the last day. And another judge held, that the votes of both Y and B were to be treated as nullities, under the act, Code, ch. 57, § 16; and therefore that Y received a majority of the legal votes cast on the last day, and was duly elected.*

* The act, Code, ch. 58, § 4, provides, that the directors, as soon as may be after every annual election of directors, shall elect a president, who shall act until his successor is appointed.

By the act, Code, ch. 16, § 17, rule third, words purporting to give authority to three or more public officers or other persons, shall be construed as giving authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

The act, Code, ch. 57, § 16, provides, that no member of the board of a chartered company shall vote on a question in which he is interested otherwise than as a stockholder.

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In March 1854, Samuel D. Booker applied to the judge of the Circuit court of Mecklenburg for a *mandamus* to compel the directors of the branch of the Exchange Bank at Clarkesville to admit him to the office of president of said branch bank. The facts are as follows:

The annual meeting of the stockholders of the Exchange Bank is held in Norfolk on the first Monday in May of each year. At this time four directors for each branch are elected by the stockholders, and three are appointed by the executive. For the year ending the first Monday in May 1853, Samuel D. Booker was the duly elected president of the branch bank at Clarkesville; and by the charter the officers are to hold over until their successors are appointed.

On the 18th of May 1853, the new board of directors for the branch bank at Clarkesville held their first meeting. Of these, the first on the list of those elected by the stockholders, was John W. Young: Booker was appointed by the executive. At this meeting the whole number being present, they proceeded to the election of a president, when upon the first vote Young received three votes, Booker received two, and Scott received one. Another vote was then taken, when but five votes were cast; Young receiving three, and Booker receiving two. Further attempt to elect a president was then postponed, and they proceeded regularly to business; Booker acting as president.

On the 25th of May, there was another attempt to elect a president. Three votes were taken, in all of which Young received three votes, Booker received two, and Scott one: And the subject was again postponed to the next regular meeting. On the 22d of June, it was again resolved to proceed to the election of a president; when Young received four votes; having voted for himself, as he said, under instructions from the stockholders; Booker received two votes, and Scott received one. And thereupon Young was

declared to be duly elected president, and proceeded to act as such. Up to this period Booker had so acted.

The court below refused to issue a peremptory *mandamus*; and thereupon Booker applied to this court for a *supersedeas*, which was allowed.

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The Attorney General and *Macfarland*, for the appellant.

Bouldin, for the appellee.

SAMUELS, J. I am of opinion, that the statute, Code, ch. 58, § 4, construed according to the statute, Code, ch. 16, § 17, rule third, gave authority to a majority of the seven directors to form a board for the election of a president.

I am further of opinion, that if a majority be present and qualified to vote and do vote, the election may be made by a majority of the votes given, although they be not a majority of the whole board; and this although others of the directors be present, but do not vote.

I am further of opinion, that inasmuch as on the 18th of May 1853, John W. Young received the votes of three directors, and Samuel D. Booker the votes of two directors, there having been but five votes given, John W. Young might then have been duly declared to be elected president, if nothing more appeared in the record. Yet as it is shown that he did not then accept the office, or enter upon its duties, but left Booker to discharge those duties, and that the election was adjourned to another day, it should be held that no election was made on that day.

I am further of opinion, that the board of directors have authority to decide when they will go into an election, or having commenced it, to decide whether they will proceed with it, or to adjourn it to another day.

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I am further of opinion, that the statute, Code, ch. 57, § 16, withholding the right of voting in case of personal interest, applies to the election of president. The obvious purpose of the statute was to prevent directors, mere trustees, from voting in such cases, lest their individual, personal interests might be promoted at the expense of the *cestuis que trust*, the stockholders. This construction is in strict conformity with the general principles of law governing the relations of principal and agent, and *cestui que trust* and trustee.

Thus I am further of opinion, that in the election of June 22d, 1853, the vote of John W. Young to put himself in office, and the vote of Samuel D. Booker the then incumbent, in effect to keep himself in office, were both given without warrant of law, and should not be counted; thus leaving but five votes, of which Young received three and Booker two, and that thus Young at that time was duly elected president.

I am of opinion to affirm the judgment.

DANIEL, J. The proceeding by way of *mandamus* seems to me to be a fair, convenient and ready mode of litigating and deciding upon questions such as those presented by the record of this case. The propriety of resorting to it in cases of the like kind is, I think, fully sanctioned in *Smith v. Dyer*, 1 Call 562, and in *Dew v. The Judges of the Sweet Springs*, 3 Hen. & Munf. 1. I am not aware that the authority of these precedents has been questioned in any subsequent decision of this court; and they furnish, in my opinion, a satisfactory answer to the objections made here to the remedy selected by the petitioner.

It becomes necessary therefore for us to consider the case on its merits. In doing so, the first question which we have to decide (and indeed the only one which needs be considered if answered in the negative) is, has Booker any right to the office?

When the new board of directors assembled on the

18th of May 1853, Booker held the office of president by virtue of a previous appointment; and by the provisions of the 4th section of ch. 48 of the Code, he had a right to enjoy the office until his successor was appointed.

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If such successor has been appointed, Booker's right to hold office any longer is determined, and he has no claim to be restored, even though it should be made to appear that Young has now no valid title to the office.

It is stated in the return, that on the 18th of May 1853 three votes were taken, all of the directors being present. On the first, six votes were cast, Booker receiving two, Young three, and Scott one. On the second and third votes, only five directors voted, and on each occasion Young received three and Booker two votes, Young and Booker each failing to vote.

Was not Young duly elected on the second casting of votes? In Wilcock on Corporations, § 546, it is said that after an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body, and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote; and such an election is valid, although the majority of those whose presence is necessary protest against any election at that time, or even the election of the individual who has the majority of votes: the only manner in which they can effectually prevent his election is by voting for some other qualified person. This section is adopted in Angell & Ames on Corporations, and forms the 126th section of the treatise. See also *Oldknow v. Wainwright*, 1 Wm. Black. R. 229; S. C. 2 Burr. R. 1017.

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It is nowhere alleged or suggested that the assembly of the 18th May was not held regularly, or that the election was not "properly proposed." The whole body of electors was present; and Young received a majority of those who chose to vote. Was he not, on the force of the authorities just cited, then elected? And if so, was not Booker's successor then appointed?

No further act is required to be done in order to complete the *title* to the office; nor indeed does the law prescribe any admission or form of induction into office to be observed in order to perfect the right to its possession.

The third section of the 48th chapter of the Code provides that no director of a bank or branch shall act as such without first taking the oath therein prescribed. But no additional oath is required of the president, as such.

When it was ascertained, therefore, that Young had received a majority of the votes cast, the right to the office was *ipso facto* conferred upon him; and consequently Booker's right to it was determined and gone. The fact that the assembly, after the vote was announced, proceeded to order an adjournment over of the election, as if no election had been made, could not have the effect of restoring Booker's right to the office. Nor is this proposition at all affected by the consideration that Young acquiesced in the adjournment, or by the further consideration that Booker still continued to act as president, without any challenge of, or protest against, his right to do so. This course was no doubt pursued by all the parties under a belief that no valid election had taken place; but all the facts on which the rights of the parties depended were fully known. There is no suggestion that the assembly did not go into the election with the intention to be governed by its legal result; and if that result was to transfer the right to the office from Booker to

Young, no subsequent action of the assembly could annul or destroy it. Young, it is true, had a right to accept or reject the office. Whether the adjournment over of the election with his assent, and the subsequent holding of the office by Booker, might not be construed into an implied refusal by Young to claim or accept the office by virtue of the proceedings of the 18th May, is, however, a question, the answer to which cannot affect Booker. The relinquishment of the office, however formal, by Young, could not invalidate the election; and of course could not reinvest Booker.

The casting of the votes, as soon as completed and announced, became an irrevocable act. The choice was then made and declared; and the appointment conferred by the appointing power, whose function *pro hac vice* was thereupon discharged and ended. There was nothing inchoate or incomplete in the transaction.

Young's title to the office, and right to enter upon it, was perfect, and of course Booker's right to hold over no longer had any existence. His old title was determined, and the resolution or order of the board adjourning over the election could not, by implication, confer on him a new title to the office. And any election thereafter held to elect a president would, in legal contemplation and intendment, be, not an election to appoint a successor to Booker, but an election to fill the vacancy occasioned by Young's resignation, or refusal to accept. *Marbury v. Madison*, Ch. Jus. Marshall's Opinion, 1 Cranch's R. 137; *Bank of Va. v. Robinson*, 5 Gratt. 174.

The objection to this view, founded on the third rule prescribed for the construction of statutes, in the 17th section of ch. 16, tit. 8 of the Code, is, I think, untenable. That rule declares that words purporting to give authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons,

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unless it shall be otherwise expressly declared in the law giving the authority. It is argued that this rule applies here; and that, under it, Young could not rightfully have claimed to be elected by the proceedings of the 18th of May 1853, as he did not, on any one casting of the votes, receive a majority of the votes of the whole body of directors. This is to give to the rule an application and effect which a fair construction of its language does not in my opinion justify. No attempt was made, by any number of the directors less than a majority of the whole, to make an election.

Conceding, for the sake of the argument, that as Young and Booker declined to vote, they should not be counted as part of the assembly, still the two directors who voted for Booker were as much engaged in the exercise of the authority given to the directors as the three who voted for Young. And Young's election, in this state of things, would be the result not merely of the action of the three directors who voted for him, but of the action of the five, in holding the assembly, going into the election, casting, counting, announcing and recording the vote. In all these things the five directors equally participated, and in this aspect of the case the election was made, the authority conferred on the body of the directors was exercised by five, and not by three directors.

But in fact Booker and Young were present, and, by force of the authority which I have cited, must be regarded as assenting to the determination of the majority of those who voted: And thus, though we should yield to the construction of the rule contended for by the counsel of Booker, and hold that in order to make a valid election four directors must unite in the specific purpose of electing a particular nominee, the requirements of the rule would be virtually and substantially fulfilled, and Young would be regarded

as the choice of five. And if it be said that in this view of the case Young would be assenting to his own election, it would still be unnecessary to go into the consideration of his right to vote for himself, inasmuch as, after discarding his assent, there would be still four, a majority of the seven directors, assenting to his election.

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From the best consideration I have been able to give to the subject, it seems to me that Young was duly elected on the second casting of votes on the 18th of May; and that Booker's right to hold over was thereby determined. Booker's right to the office being thus negatived, it becomes unnecessary to look into the present state of Young's title. Without considering, therefore, whether or not Young has lost or abandoned his title to the office as founded on the election of the 18th of May, and if so, whether or not he was afterwards legally elected on the 22d of June 1853, I am for affirming the judgment, on the ground that Booker, at the date of the institution of this proceeding, had no right or title to the office.

LEE, J. concurred in the opinion of DANIEL, J.

MONCURE, J. concurred in the results; but did not concur entirely with DANIEL or SAMUELS, Js. He thought that the first election not having been insisted on, was no election. But he thought that Young might vote for himself, and that therefore the second election was valid.

JUDGMENT AFFIRMED.

Richmond.

1855. SOUTHALL's *adm'r v. THE EXCHANGE BANK OF VA.*
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Term. (Absent ALLEN, P.)

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1. In an action of debt, the common order is confirmed at rules irregularly, the defendant having pleaded to a part of the plaintiff's demand. This irregularity cannot afterwards be corrected at rules.
 2. An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication, and reply; and if the plea filed at rules does not go to the plaintiff's whole demand, he may sign judgment for so much as is not covered by the plea.*
 3. In such a case the defendant is entitled to a continuance of the cause as of right, if he demands it. But if instead of asking for a continuance, he asks that the cause may be sent back to rules, and excepts because his motion is overruled, the appellate court cannot reverse the judgment because the court required him to proceed to trial.

This was an action of debt in the Circuit court of York county, by the Exchange Bank of Virginia against George W. Southall's administrator, upon a negotiable note for the sum of eight thousand eight hundred and sixty dollars, made by one Richard Coke, junior, and endorsed by Southall; and discounted by the Exchange Bank.

At the August rules 1852, the declaration was filed, and a common order taken.

At the September rules, the defendant in the action appeared and filed a plea of payment of eight thou-

* Code, ch. 171, § 51, p. 653. "The court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings or correct any mistake therein, and make such order concerning the same as may be just."

sand eight hundred dollars, parcel of the debt in the declaration mentioned, and gave a rule for replication: and at the same rules the plaintiff filed a replication to the plea; and an issue was made up upon it by the clerk.

At the ensuing term, the defendant moved the court to correct the error alleged to have been committed by the clerk in failing to enter a discontinuance of the cause, upon the plaintiff's filing a general replication to the plea of the defendant: And thereupon, on the motion of the plaintiff, he had leave to withdraw his replication; and the cause was sent to rules for further proceedings. This was upon the 29th of September 1852.

At the October rules 1852, the record states that on the motion of the plaintiff, the common order entered against the defendant at the August rules was confirmed.

At the November and December rules 1852, and at the January and February rules 1853, the entry was that the cause was continued for replication, on motion of the plaintiff.

At the March rules 1853, the plaintiff filed a general replication to the plea; and took a confirmation of the common order for the part of the debt in the declaration mentioned not answered by the plea.

At the following term, the defendant moved the court to send the cause back to rules, because the clerk had improperly entered a confirmation of the common order at the October rules; and because he had improperly received a replication to the plea at the March rules, and given judgment for that part of the debt not controverted by the plea. But the court being of opinion that the errors at rules might be corrected by the court, refused to remand the cause to rules, set aside the orders entered at the October and March rules, and gave the plaintiff leave to file his

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replication at that time. The replication was then filed, and an issue made up thereon: and at the same time judgment was granted the plaintiff for that part of the debt not answered by the plea.

The court was also of opinion, that the case should be then tried unless the defendant showed he would be prejudiced thereby; which not being shown, the defendant pleaded *nil debet*, on which issue was joined:

And a jury having been impaneled, a verdict was found, and final judgment rendered for four thousand one hundred and ninety-eight dollars and seventy-one cents, with interest and costs.

To the opinion of the court refusing to send the cause back to rules, and giving leave to the plaintiff to reply to the plea in court, the defendant excepted. And he subsequently presented a petition to this court for a *supersedeas* to the judgment, which was allowed.

Crump, for the appellant.

Morson, for the appellee.

LEE, J. It is not alleged by the plaintiff in error that the judgment rendered in this case is for any other or greater sum than is justly due from the estate of his intestate to the defendant in error. The complaint is that irregularities have been committed in the proceedings which have resulted in the judgment; and for those irregularities it is said the judgment should be reversed.

According to the rule of pleading, if a plea profess to answer only part of the declaration, and is in truth but an answer to part, the plaintiff is entitled to "sign" judgment for the part not answered by the plea, and to demur or reply as to the part that is answered. If however he demur or reply to the plea without signing judgment for the part not answered, the whole action is discontinued. 1 Chit. Pl. 453; Steph. Pl. 232; 1

Saund. 28, n 3. So that when the plea was filed at the September rules 1852, the plaintiff in the action should have caused the common order to be confirmed as to so much of the debt as the plea did not and did not profess to answer. The failure so to do, and filing a general replication, occasioned the technical discontinuance of the action. And so at October rules after the cause had been remanded to rules at the previous term, the plaintiff, instead of confirming the common order generally, should have confirmed it as to the part not answered by the plea, and then filed his replication. Nor after such a general confirmation of the office judgment, could the irregularity be cured by the subsequent proceedings at the rules. The clerk I apprehend could not correct the error which had been committed at the October rules, by making the proper entry at the March rules following. By the general confirmation of the common order at the October rules, the proceedings at rules were closed; and the defendant could not be held to attend longer at the rules in the expectation that at a subsequent rule day the plaintiff would correct the error in his proceedings, and put him to a further pleading.

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But though it was not competent for the clerk to correct the proceedings at rules, yet under the fifty-first section of chapter 172 of the Code, p. 653, the court, it is clear, had full authority so to do. By that section, control is expressly given to the court over all proceedings in the office during the previous vacation; and it may reinstate any cause discontinued during such vacation, set aside any of the proceedings, correct any mistake therein, and make such order concerning the same as may be just. There can be no doubt then that the court might properly, as it did, set aside all the proceedings at rules after the cause had been remanded at the previous term, and permit the plaintiff to do then, in court, what he could and should have

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done at the rules, to wit, file his replication and take judgment for the part not answered by the plea. No injustice could be done by this to the defendant, as it only placed the cause exactly where it would have been but for the irregularities which had occurred at the rules. The whole matter then resolves itself into the question whether the case should have been tried at the same term. And here I do not hesitate to say that if the defendant had claimed a continuance of the cause as a matter of right and without showing any cause, he would have been clearly entitled to it. The plaintiff having only at that term placed himself *rectus in curia*, could not insist upon a trial at the same term. He was bound to submit to a continuance of the cause if the defendant had claimed it. But it does not appear that the defendant asked for a continuance, nor did he take any exception to the opinion of the court that the case might be tried at the same term. His motion was to send the cause back to rules, and his exception was to the refusal of the court to grant this motion, and to its giving the plaintiff leave to reply to the plea. If he had claimed a continuance of the cause and the court had refused it, and he had tendered a bill of exceptions, the plaintiff might have yielded the point; and if otherwise, and the exception had been taken, I think it would have been error for which the judgment should have been reversed. But I do not think the court erred either in permitting the plaintiff to reply in court to the plea, and take judgment for the part unanswered by it, or in refusing to send the cause back to rules.

I am of opinion therefore to affirm the judgment.

The other judges concurred in the opinion of LEE, J.

JUDGMENT AFFIRMED.

Richmond.**WINSTON v. STARKE & als.**1855.
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(Absent ALLEN, P.)

April 30.

In a suit between S, trustee in a deed for the wife of the grantor, and B, a creditor of the grantor, the deed is held to be fraudulent to the amount of one thousand four hundred and eighty-three dollars; much more than sufficient to pay B's debt. W, another judgment creditor of the grantor, files a bill, in which he states his debt and the decree in the former suit; and asks that S may be decreed to pay plaintiff's debt out of the balance remaining in his hands for which the deed was declared fraudulent: And he files a copy of the record in the first case. S answers, denying that the deed was fraudulent, and objecting to the record of the former suit as evidence. HELD:

1. If the bill is to be considered as charging fraud in the deed, the answer puts that fact in issue; and the plaintiff not having been a party or privy in the first suit, the record is not competent evidence.
2. The bill does not charge fraud in the deed, but relies upon the first suit as a proceeding of which plaintiff is entitled to the benefit. The case does not come within the principles upon which proceedings *in rem* are held to bind all the world.
3. It is not the duty of the court to advise a party as to the sufficiency of his evidence; as to that he must judge for himself, before going to a hearing of his cause.
4. If a party has doubt about the admissibility of his proof when objected to, he may bring the question before the court, and have it decided before going to a hearing.

This was a suit in equity in the Circuit court of Hanover county, instituted by Philip B. Winston against Joseph Starke and others. The case is stated by Judge SAMUELS in his opinion. The Circuit court dismissed the bill: And Winston thereupon applied to this court for an appeal, which was allowed.

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Lyons, for the appellant.

Griswold and Claiborne, for the appellees.

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SAMUELS, J. The bill in this case in substance alleges, that complainant has obtained a judgment for debt, interest and costs, and issued a writ of *fieri facias* thereon against William L. White. That about the time of or shortly after the rendition of complainant's judgment, White took the benefit of the insolvent laws at the suit of other creditors. That before White's insolvency, he had made a conveyance to Joseph Starke, as trustee for the benefit of White's wife and children. That this conveyance was afterwards assailed in the Circuit court of Hanover, as fraudulent and void, and that it was so adjudged to be by the decree of that court to the amount of one thousand four hundred and eighty-three dollars and ninety-six cents. That by a subsequent decree, Starke the trustee was directed to pay Ira L. Bowles, the creditor who had so assailed the deed, the sum of seven hundred and nineteen dollars, and interest, parcel of the sum of one thousand four hundred and eighty-three dollars and ninety-six cents, leaving the residue thereof liable for White's debts, of which that due complainant had priority; the residue, however, being more than enough to pay complainant's debt. The bill refers to the papers and proceedings in the case of *Bowles v. Starke*, (meaning *Starke v. Bowles*), as evidence.

Complainant also filed with his bill abstracts from the record in the case of *Starke v. Bowles*, also copies of the deed of trust from White to Starke, as trustee, and of White's insolvent papers.

Starke filed an answer to Winston's bill. He denies that the deed of trust was tainted with fraud; and he also objects to the proceedings had in the case of *Starke v. Bowles*, as evidence for any purpose in this suit.

If the bill in this case could be regarded as tendering an issue on the fact of fraud, the answer makes that issue by denying the fraud; and this would impose on the complainant the necessity of proving his bill.

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The only proof offered by complainant on this issue is the record in the case of *Starke v. Bowles*, to which complainant was no party, nor is he in privity with any party thereto. This record and the abstracts therefrom were objected to as inadmissible; and on well settled principles the objection was well taken. It was wholly irrelevant to the issue of fraud (if made up between these parties) that in another case, at a different time, between different parties, and upon other evidence, the same or a like issue had been decided. The fact that such decision had been made is immaterial, and could not be proved. With much appearance of reason can it be said that the record might be used as evidence not only of its own existence, but also to prove the facts upon which the decision therein was rendered. In any case in which a record is relied on as evidence, it must conclude both parties to the case, or neither. It is perfectly clear that Winston was not bound by the decree in *Starke v. Bowles*; he was no party to it; had no opportunity to offer evidence, to be heard at the trial, or to appeal if aggrieved by the decision; he was not bound by the decision that White's deed to Starke was void to the amount of one thousand four hundred and eighty-three dollars and ninety-six cents, and good for all beyond that sum. If he had the evidence, he might have assailed the deed as wholly fraudulent, and therefore void. Winston not being concluded, Starke stands in the same condition.

I have considered the case up to this point as if the parties were at issue upon the question of fraud in the deed; the pleadings, however, present no such issue.

1855. The bill does not allege as a fact that fraud existed,
April but merely that another party, in a different suit, had
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Winston of complainant's case is, that as Bowles established
v. his charge of fraud against the deed, his success enures
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and *fieri facias*. That the suit between Starke and
Bowles was a proceeding *in rem*, and that all the world
is bound by the result in that case. No authority is
cited to sustain this position; nor can any be found
affording it the slightest support. The case presented
merely the comparative merits of the lien held by
Starke and that held by Bowles; the court held that
Bowles' lien to the full amount of his debt took pre-
cedence of Starke's lien; thus the only question in the
cause was decided. It is true the Circuit court did
decree that Starke's lien was invalid as against Bowles
to an amount exceeding Bowles' debt; the difference
between Bowles' debt and the amount declared to be
fraudulent was not expressly disposed of, but left in
the hands of Starke, whereby in effect it was decided
that Starke had the better right to it.

This case falls clearly without the principles upon
which proceedings *in rem* are held to bind all the
world. See 1 Stark. Evi. p. 228, § 77; p. 99, § 73.

It was insisted by the appellant's counsel in the
argument here, that if the evidence offered by com-
plainant were inadmissible, still the court should not
have dismissed the bill, but should have given him
leave to offer additional proof. In reply it may be
said that the Circuit court was under no legal obliga-
tion to offer advice in regard to the sufficiency of the
proof; that is a subject upon which parties must decide
for themselves before going to a hearing. If a party
be in doubt about the admissibility of his proof, when
objected to, he may bring the subject to the notice of
the court before going to hearing; if, however, this

course be not pursued, the court cannot know whether or not the party has any other proof to offer. In this case the evidence was sufficient to prove that Bowles had successfully impeached the deed to Starke; and upon this fact, in connection with his own lien by judgment and execution, complainant sought to recover without any other allegation or proof of fraud. On these facts, although fully appearing, the court rightly dismissed the bill. The defect was in the case itself, not in the proof by which it was established.

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I am of opinion to affirm the decree.

DANIEL and LEE, Js. concurred in the opinion of SAMUELS, J.

MONCURE, J. was for affirming the decree; but thought it should be without prejudice to the right of the appellant to file a bill to set aside the deed for fraud.

DECREE AFFIRMED.

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(Absent ALLEN, P.)

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H owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W, the land on the north side: And in their report they made no allusion to the dike. The son receiving the land on the south side of the creek, afterwards sold it to B; and then W owning the land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H, and overflow the low grounds on the south side. B then filed a bill to enjoin the building of the dike on the north side. HELD:

1. B is entitled to have his dike as it was when H died, and to have his lands protected thereby; and W has no right to build a dike on his side of the creek, which would destroy the dike of B, and overflow his low grounds.
2. Equity will interfere to prevent the building of the dike; and will compel W to abate so much of his dike already built as would injure the dike and low grounds of B.

This was a bill in the Circuit court of Powhatan county by Blair Burwell to enjoin Willis W. Hobson from building a dike upon his land along the margin of Deep creek, in that county. The pleadings and proofs make the case as follows:

Joseph Hobson, under whom both parties claim, owned a large tract of land in the county of Powhatan, lying on both sides of Deep creek. Some years before his death he cleared up the low grounds on the south side of the creek, and to protect them from the floods of the creek, he built a dike along the south bank of the creek, about four feet high, and extending

down the creek about four hundred yards, to a natural elevation in the ground. The dike was kept up from that time until this suit was brought, though there were some breaks in it, at this latter period, which had not been repaired. The low grounds on the north side of the creek were rather higher than on the south side; and though a part of them was cleared, that part lying farthest up the creek remained in woods. There was no dike on that side of the creek.

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Joseph Hobson died before the year 1833; and in that year his estate was divided among his children, by commissioners appointed by the County court of Powhatan. In this division the commissioners allotted to Joseph V. Hobson a tract of one hundred and twenty acres, bounded on the north by Deep creek, and embracing the low grounds protected by the dike aforesaid. And they allotted to Willis W. Hobson a tract of one hundred and eighty acres, bounded on the south by Deep creek, and separated by that creek from the land allotted to Joseph V. Hobson.

In November 1834 Joseph V. Hobson sold and conveyed the land allotted to him, to his brother Thomas L. Hobson; and in December 1838, Thomas L. sold and conveyed to Blair Burwell. Burwell owned a tract of land lying on both sides of the creek just above these lands.

In 1851 Willis W. Hobson commenced to build a dike on his side of the creek, extending it at one point to within six feet of the bank. This dike was about six feet high; and the evidence was very clear that its effect would be to throw the water in times of freshets in the creek, (and they were frequent,) upon the low grounds of Burwell which had been protected by the dike built by Joseph Hobson, unless that dike was raised and strengthened, which could not be done but at great expense. It was equally clear that without his dike, Hobson's low grounds were overflowed when

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Hobson. there were freshets in the creek, and that if he was permitted to complete his dike they would be protected.

Upon the application of Burwell, Hobson was enjoined from proceeding to build his dike: and when the cause came on to be heard, the court being of opinion that both parties had equal right to have their lands secured against the freshets of the creek, appointed commissioners who were directed to report a plan by which this object might be attained. These commissioners reported that the object could be effected by building a dike upon either side of the creek at a proper distance from it, and by keeping the bed of the stream clear of sand and other deposit to the depth of three feet below the surface of the flat lands adjoining, and by the removal of all obstructions to the passage of the water for the whole distance between the creek and the proposed dike. And they fixed the height of the dike above the flat land at six feet; and that it should be forty feet from the centre of the channel of the creek to the foot of the slope of the dike next the creek. This report was excepted to by the plaintiff.

When the cause came on to be finally heard, the court overruled the plaintiff's exception to the report, and decreed that the plaintiff and defendant should each within six months from the date of the decree, remove so much of their respective dikes or embankments located on their lands respectively, as approached within forty feet of the centre of the natural channel of Deep creek; and all other obstructions to the natural flow of the water of said creek, built or constructed by them or those under whom they claim, within the said space of forty feet from the centre of said creek. And they each were authorized to erect on their own lands dikes or embankments to the height of six feet above the ordinary level of the adjoining flat land on their respective sides of said

creek, provided the same did not approach nearer than forty feet of the centre of the channel of said creek; and to remove the obstructions to the flow of the water on their respective sides between the said embankments and the creek. And Hobson was enjoined from proceeding to erect the dike he had commenced in any manner inconsistent with the decree. From this decree Burwell applied to this court for an appeal, which was allowed.

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Burwell, Rhodes and Macfarland, for the appellant.
Patton, for the appellee.

MONCURE, J. The maxim *sic utere tuo ut alienum non laedas* emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons. This is a plain proposition, laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee.

But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream, is not laid down or recognized by any elementary writer, nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction, is, that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. Angell on

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Water Courses, § 333. But he has no right, for his greater convenience and benefit, to build any thing which, in times of ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them. Id. § 334. If, in the case of such an obstruction, it appears that the injury therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, he is liable for the damage. Id. § 349. That the supposed distinction does not exist was expressly decided by the Court of king's bench in *Rex v. Trafford*, 20 Eng. C. L. R. 498. Tenterden, C. J. in delivering the judgment of the court in that case said, "Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction." Id. 502. The judgment in that case was reversed in the Exchequer chamber. *Trafford v. Rex*, 21 Eng. C. L. R. 272. But that court agreed in the principle laid down by the Court of king's bench, though it did not discover, upon the special verdict, a finding of sufficient facts to warrant its application to the case.

It is often the mutual interest of adjacent riparian proprietors to agree to erect works on their respective lands to protect them against floods, and keep the water at all times in its natural channel. That interest is generally sufficient to bring them to such an agreement. But in the absence of agreement express or implied, or of any statutory provision on the sub-

ject, the law affords no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public, and will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his as a necessary means of defense. Each has the exclusive right to judge and act for himself on this subject; taking care not to injure the property of the other.

But the counsel of the appellee further contended that as Burwell has a dike on his land, which has the effect of throwing the water, in freshets, on the land of Willis W. Hobson, the latter has therefore a right to erect a dike on his land to defend it against such inundation.

The correctness of this position depends upon whether the dike of Burwell was lawfully erected, and whether he has a legal right to the protection which it affords him.

It was certainly lawfully erected. It was erected many years ago by Joseph Hobson, under whom both of the parties claim, and who was then the proprietor of the lands of both. He had a perfect right to erect it, as it interfered with nobody but himself. Before he erected it, the water of the creek, in freshets, diffused itself over the land on both sides. He wished entirely to protect his valuable arable land on the south side from inundation, by causing all the superabundant water to flow on the north side, the upper part of which was then, as now, in woods, and naturally more capable of resisting high water than open land, as well as less liable to injury from being overflowed. He erected the dike for that purpose; and it had the desired effect. In this state of the property he died intestate, and it was divided by decree of a court of chancery among his heirs; the land on the south side, containing one hundred and twenty acres, being allotted to his son Joseph V. Hobson, and that on the

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north, containing one hundred and sixty acres, being allotted to the appellee Willis W. Hobson. The land on the south side was conveyed by Joseph V. Hobson to Thomas L. Hobson in 1834, and by the latter to the appellant Burwell in 1838. The dike has been repaired by the successive proprietors of the land, from time to time since the death of the intestate Joseph Hobson, and is now in the same state in which it then was, except that there are a few breaches in it which need repair.

Then has not the appellant a legal right to the dike, and to the protection which it affords him? Why is he not as much so entitled as he is to any other part of the land on which it stands? What difference is there between an artificial dike lawfully erected, as this was, and a natural mound? There is a natural mound below the dike; which is but an artificial continuation of that mound to a point near the upper line. Until the dike was erected, the proper course of a part only of the superabundant water produced by freshets, was over the northern side; after that erection, the proper course of all that water was over that side; just as if, from natural causes, it had always flowed on that side. The change was made by one who had a perfect right to make it. And the flow of the water can no more be disturbed, to the injury of another, in its new direction, than it could have been in its natural course. Suppose the intestate had changed the ordinary bed of the creek, and made it run entirely through the land on the north side of the natural bed. Could the appellee, by any obstruction of the new bed, turn back the stream to the old, to the injury of the appellant? What difference is there between a change of the course of the ordinary stream and a change of the course of the superabundant water produced by freshets? Suppose a mill had been erected, instead of a dike, on the south side; and the

water thrown back on the land on the north side; would not the appellant have been entitled to the mill and its appurtenances, including the right to overflow the land on the north side? That he would be, is shown by the case of *Kilgour v. Ashcom*, 5 Har. & John. 82, in which a similar question arose. The children of the intestate, said the court in that case, "took their respective proportions of their father's estate in the same condition, and subject to the same advantages and disadvantages under which he held it."

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It is admitted that the commissioners who divided the intestate's land might have given to the lot on the south side the advantages of the dike thereon, and subjected the lot on the other side to the disadvantage of it; but it is said that it should plainly appear on the face of the report, that they intended to do so; otherwise it will be presumed that they did not; and that in this case no such intention appears in the report, nor does it appear therein, or from any extrinsic evidence, that they considered the advantages and disadvantages of the dike in making the division. The dike is not mentioned in the report; and the only evidence it affords that the dike was considered by the commissioners in making the division, is the disparity in the quantity of the two lots. On the other hand the evidence shows that the average value of the land on the south was greater than that on the north side of the creek, but does not show that the value of the land on the south side without the dike, would be equal to that on the north.

But I think that while the commissioners might have directed the dike to be taken down, or allowed the appellee to erect a similar dike on his side of the creek, the presumption, in the absence of evidence on the face of the report to the contrary, is, that they did not intend to do so, but intended to give the dike and all its advantages to the heir on whose lot it stood.

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They saw the dike, and knew its advantages and disadvantages. How can it be fairly presumed that they did not consider them in making the division? "It

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was the duty of the commissioners, (said the court in *Kilgour v. Ashcom*, before cited,) and it must be supposed that they did, in dividing the estate of John Keech, to take into consideration all the advantages and disadvantages attending the respective parts, and that they gave to the part allotted to Mary Keech an equivalent for the injury an inconvenience occasioned by the mill dam; and she took it accordingly." These observations are just, and strongly apply to this case.

If the intestate had conveyed the land, with the dike thereon, to the appellant, the latter would have been entitled to the benefit of the dike, and the intestate could not have deprived him thereof, by erecting a dike on the other side. If the heirs had divided the land among themselves by mutual agreement, and interchanged deeds for the lot of each, the deed conveying the lot with the dike thereon would have entitled the grantee to the benefit of the dike, and he could not have been deprived thereof by the act of any of the other heirs. There is no difference in this respect between a partition by suit, and a partition by mutual agreement and the interchange of deeds. In each case the heirs are in effect purchasers of their respective lots, and entitled to hold them as any other purchaser would be.

The appellee in his answer seems to admit that the appellant is entitled to the benefit of the dike on his land, but claims a right to erect a similar dike on his own land for the purpose of defending it from inundation occasioned by the dike of the appellant. This admission, I think, concedes the whole question in controversy. For if the appellant be entitled to the benefit of the dike, I do not see how it can be taken away from him indirectly, by erecting a counter dike

on the other side. But even if the appellee were entitled to this mere right of defense, it would not justify him in erecting a dike much higher and stronger than that of the appellant. Having erected such a dike, he was compelled to rely on other grounds for his justification, and therefore claimed a right to erect any obstruction on his own land which may be necessary to protect it from floods, though the superbundant water be thereby thrown on the land of his neighbor. This ground is wholly irrespective of the question as to the right of the appellant to the benefit of the dike on his land, and would, if sustainable, be a sufficient justification even if no such dike existed. But I think I have said enough to show that the right so claimed by the appellee does not exist. As to the other ground relied on by him that his dike is necessary to prevent the creek from changing its original bed, I concur in the opinion of the Circuit court that it is not necessary, and was not erected for that purpose.

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In any view of the case, it seems to me that the decrees of the Circuit court are erroneous. They not only take away from the appellant the benefit of a dike lawfully erected upon his land, but place him on worse ground than he would have occupied if no such dike had ever existed. They require him to take it down, and leave his land exposed to be overflowed, not only as it was before any dike was erected thereon, but by the whole quantity of water which may at any time overflow the natural bed of the creek, if the appellee should avail himself of the liberty given him of erecting a dike six feet high on his side of the creek, and the appellant should not avail himself of a similar liberty given to him. It would of course be competent for the parties, by their own agreement, to make such an adjustment of their rights as this; but I do not see on what principle it can be decreed without their consent.

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Upon the whole, I think that the appellant is entitled to the benefit of the dike on his land, as it stood at the time of the division of the estate of Joseph Hobson among his heirs, and to repair and keep it up; and that the appellee has no right to erect any dike or other obstruction on his land, which will have the effect of injuring the land of the appellant, or the dike thereon.

The evidence clearly shows that the dike which the appellee was constructing, when he was enjoined from so doing in this case, would have the effect of washing away the appellant's dike, overflowing his valuable low grounds, and turning the course of the creek permanently through them; and of thus doing him irreparable injury. This is a wrong which a court of chancery has power to prevent and redress.

I am therefore of opinion that the decrees of the Circuit court are erroneous, and ought to be reversed with costs, and that the injunction ought to be perpetuated with costs, and with liberty to the appellant to apply to the Circuit court to cause an abatement to be made of the dike already constructed on the land of the appellee, or so much thereof as may have the effect of injuring the land of the appellant or the dike thereon.

The other judges concurred in the opinion of MONCURE, J.

The decree was in conformity to the opinion.

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1. The doctrine of perpetuities applicable to bequests of personal chattels, does not apply to a bequest of freedom to a slave.
2. Testator by his will directs that a female slave Nancy shall be freed at the end of twenty years from his death. And he then directs that if she shall have children whilst she continues in servitude, "the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall become free." Within the twenty years Nancy has a child J, and before J is thirty-one she has a child M. HELD: That at the age of thirty-one M is entitled to her freedom.

Joseph Pierce, of Westmoreland county, died in 1798, leaving a will, which was duly admitted to probat. By one clause of his will he gave a negro woman and her four children to one of his daughters. In another clause he says he has set at liberty five negroes whom he names, and he wishes that they shall continue so. He then names five other negroes, who he says he cannot think of leaving slaves for life; and therefore they are to be at liberty at the end of five years. The testator then names separately eighteen other slaves, and directs that each of them shall be freed after a certain number of years. One of these is a woman named Nancy who is to be freed at the end of twenty years.

The next clause of the will says: "It is my further desire, that if any of the above named female negroes mentioned in this my last will, shall have children while they continue in servitude, it is my will that the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall all become free."

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The woman Nancy before the twenty years had expired, became the mother of a female child named Julianna; and Julianna before she reached the age of thirty-one years, became the mother of Frances Wood, who after she had attained the age of thirty-one instituted proceedings in the Circuit court of Jefferson county, for the recovery of her freedom, against John Humphreys who held her claiming her as his slave for her life. Upon the trial the foregoing facts were found by the jury in a special verdict; upon which the court gave judgment for the defendant: And upon the application of the plaintiff this court allowed her a *supersedeas*.

Patton, for the appellant.

Andrew Hunter, for the appellee.

MONCURE, J. The questions arising in this case are, first, Did the testator intend that not only the children of Nancy, but all her remoter descendants, born whilst their mothers continued in servitude, should serve until they became thirty-one years of age, and then be free? And if he did, secondly, Was such intention lawful? I will consider these questions in their order.

First, as to the intention of the testator:

It was decided in *Maria v. Surbaugh*, 2 Rand. 228, that where a female slave is entitled to freedom *in futuro*, her increase born while she continues in servitude are slaves. That decision has not been universally approved. But it has been recognized and confirmed in many subsequent cases. *Isaac v. West's ex'or*, 6 Rand. 652; *Erskine v. Henry*, 9 Leigh 188; *Crawford v. Moses*, 10 Id. 277; *Anderson's ex'or v. Anderson*, 11 Id. 616; *Henry v. Bradford*, 1 Rob. R. 53; *Ellis v. Jenny*, 2 Id. 597; *Osborne v. Taylor's adm'r*, *supra* 117. The principle of that case may now therefore be regarded as the settled law of the land, except so far as

it has been changed or modified by the Code, which does not apply to this case.

The principle is founded on the rules and policy of the law, and not on the presumed intention of the testator, or other person from whom the right to future freedom is derived. When freedom *in futuro* is given to a female slave, the donor rarely intends that her increase born in the mean time shall be slaves for life. He generally either intends that they shall follow the condition of their mother, not only in respect to present slavery, but also in respect to future freedom, and does not say so simply because he believes it will follow as a legal consequence of the emancipation of the mother; or he fails to say so merely because the idea does not occur to him. "I have no doubt (says Judge Green in *Maria v. Surbaugh*) but that if the idea had occurred to him, that she would probably have children before she attained her age of thirty-one, he would have expressly provided that they also should be free; which could have been effected by the addition of these words 'and her increase.' His not having done so satisfies me entirely, that he never thought of or intended to make any provision for the children. And if so, it was a subject in relation to which he had no thought, or will or intention; and is consequently to be disposed of according to the law of the land." But whether the donor has no intention on the subject, or, having such intention, fails to express it, the subject must in either case, be disposed of according to the law of the land.

The court, however, has given effect to this presumed intention wherever any words have been found in the deed or will which could fairly be construed to express it. In *Isaac v. West's ex'or*, 6 Rand. 652, the deed was construed as conferring on the slaves a present right to freedom, reserving to the grantor a right to their services during his life, as a condition of the

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emancipation; and it was, therefore, held that a child born of one of the emancipated females in the interval between the execution of the deed and the death of the grantor, was free from its birth. In *Elder v. Elder's ex'or*, 4 Leigh 252; *Erskine v. Henry*, 9 Id. 188; *Anderson's ex'ors v. Anderson*, 11 Id. 616; *Lucy v. Che-minant's adm'r's*, 2 Gratt. 36; and *Osborne v. Taylor's adm'r, supra* 117, the word "all," and other words of like comprehensive import, used in a will in reference to slaves to whom freedom *in futuro* was given, were construed to embrace the increase of the females born between the death of the testator and the period when the slaves were to be free.

The change made in the Code, ch. 103, § 10, p. 458, was designed to effectuate in all cases this presumed intention to emancipate the future increase of a female slave to whom freedom *in futuro* is given. The provision is, that "the increase of any female so emancipated by deed or will hereafter made, born between the death of the testator or the record of the deed, and the time when her right to the enjoyment of her freedom arrives, shall also be free at that time, unless the deed or will otherwise provides." This provision does not alter the condition or *status* of the mother before that time arrives: Until then she is still a slave. It only presumes in the absence of any intention appearing in the deed or will to the contrary, that the future increase of the female were intended to follow the condition of their mother, not only in regard to present service, but also in regard to future freedom. The owner may direct otherwise; may declare his intention that the future increase of the mother born while she continues to be a slave, shall be slaves for life; and such intention would not be repugnant to the grant of future freedom to the mother.

This case occurred before the Code, and must therefore be governed by the pre-existing law. The testator

directed Nancy to be freed at the end of twenty years. The increase of Nancy born during that period, and their issue, are slaves for life, on the principle of the case of *Maria v. Surbaugh*, unless the testator has directed otherwise in his will. He has certainly directed otherwise in regard to the children of Nancy born during that period, and declared that they should serve until they should become of the age of thirty-one years, and no longer. If the testator had stopped at that point, still the case would have fallen within the principle of *Maria v. Surbaugh*, in regard to the more remote descendants of Nancy. But it would have been difficult to have accounted for his intention, if it did exist, to emancipate Nancy and her children, but not her more remote descendants. "He might have strong reasons (says Judge Brooke in *Maria v. Surbaugh*, 2 Rand. 228, 245,) for liberating her when she should arrive at the age of thirty-one, which did not apply to her children born before that period." But what conceivable reason could he have had for liberating her children born after his death and before she arrived at that age, which did not apply to her more remote descendants born during the temporary service of their mothers? If he intended to emancipate the former, he must have also intended to emancipate the latter. The idea that the females would probably have children before they attained the age of thirty-one years, certainly occurred to him; for he expressly provided for that event in regard to Nancy. Did he make a similar provision in regard to her female descendants? I think he did. After providing that if any of the females (including Nancy) emancipated *in futuro* by the previous clause of his will, should have children while they continued in servitude, such children should serve until they become of the age of thirty-one years, and no longer; he added the words, "and so on, until they shall all

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become free." These words, I think, indicate, that the testator intended to emancipate the mothers and all their descendants, subjecting such of the latter as might be born while their mothers were slaves only to such a limited period of service as he supposed would fully compensate their temporary owners for the expense of raising them. He wished "all" to become free; thus using that comprehensive word which has been so often held to embrace future increase, and to take a case out of the operation of the principle of *Maria v. Surbaugh*. He had expressed his wish in regard to children, and declared how long they should serve, and when they should be free: and to avoid repetition in regard to each succession of remoter descendants, he used the general and relative words, "and so on," that is, after the manner and rule prescribed in regard to children, "until they shall all," that is, the females and their descendants, "become free." This, I think, is the natural and rational construction of the words, and the only one which will give them effect. If they have not this meaning, they have none, and the will must be read and construed as if they were not in it; for if the testator only intended to apply the provision to children, his intention is fully and plainly expressed without those words. "The court is bound to give effect to every word of the will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole will taken together." 1 Jarm. on Wills, 411, note (1.) I am therefore of opinion that the testator intended, and has expressed the intention, that not only the children of Nancy, but all her remoter descendants, born whilst their mothers continued in servitude, should serve until they become thirty-one years of age, and then be free; and the next question is,

Secondly, As to the legality of such intention?

Some judges have doubted whether the statute, 1

Rev. Code of 1819, ch. 111, § 53, p. 433, giving owners of slaves a right to emancipate them, authorized the gift of freedom *in futuro*. But these judges have admitted that the statute has been long and uniformly construed to give such authority, and that the construction could only be changed by legislative power. Tucker, P. in *Crauford v. Moses*, 10 Leigh 279; Brooke, J. in *Anderson's ex'ors v. Anderson*, 11 Leigh 624. The cases which recognize this construction are too numerous to be cited; and it is too well settled to require any citation of cases. Instead of being changed, it has been confirmed and adopted in the Code, ch. 103, § 10, p. 458, before referred to.

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It may therefore be assumed that the statute authorized the gift of freedom *in futuro*: And the only question is, whether the authority was subject to any limitation as to the period when the gift was to take effect; and if it was, whether this case falls within the limitation?

The statute itself was silent on the subject; and if there was a limitation, it resulted from the rule of law in regard to perpetuities. If that rule applies to this case, the plaintiff is not entitled to her freedom, the contingency on which her claim is founded being too remote. But does it apply to the case?

In *Pleasants v. Pleasants*, 2 Call 319, it was held that the rule does not apply to a case of emancipation, and that persons claiming freedom, under circumstances like those under which it is claimed in this case, were entitled thereto. That case was decided by a court of three judges, to wit, Pendleton, Carrington and Roane. Two only of the three concurred in the decision; and it is therefore not, in itself, a binding authority. Whether it ought to govern this case, must depend on the reason on which it was founded, and the circumstances which attended and followed it. There is a manifest difference between

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a gift of freedom and a gift of property. In some respects they are similar, but in most respects different. Many of our judges have admitted and commented upon this difference: Many of our decisions are founded upon it. *Maria v. Surbaugh* is founded upon it; for the plaintiff, in that case, would not have remained the slave of the testator if there had been a bequest of the mother in remainder, instead of a bequest to her of freedom *in futuro*. *Parks v. Hewlett*, 9 Leigh 511, is founded upon it; for if the female slave in that case had been given to another person instead of being emancipated, her issue born afterwards would have been liable for the debts of the donor, instead of being exempt from such liability. "Emancipation is not strictly a gift of property," as was said by Tucker, P. in that case. It is a renunciation of the relation of master and slave, which the master is permitted by law to make. It is the conjoint act of the law and of the master, with which the slave has nothing to do. Whether his freedom be a boon or not, he cannot refuse it, if it be conferred upon him by his master in the mode prescribed by law. He is not required to give a refunding bond, as a legatee is; "and, in case of deficiency of assets, though the specific legatees may be compelled to abate proportionably, emancipated slaves would only be compelled to abate as between themselves. In other words, all other specific legacies must be swept before an emancipated slave can be subjected to the debts at all." Tucker, P. in *Nicholas v. Burruss*, 4 Leigh 289, 296. See also *Patty v. Colin*, 1 Hen. & Munf. 519; and *Jincey v. Winfield's adm'r*, 9 Gratt. 708. It does not follow, therefore, that the rule in question is applicable to a gift of freedom, because it is applicable to a gift of property. It is applicable to a gift of property, because it is against the policy of the law that property should be rendered perpetually

inalienable. It may not be applicable to a gift of freedom, which is a renunciation of property.

So much for the reason on which *Pleasants v. Pleasants* seems to be founded; and now in regard to the circumstances which attended and followed it. It was decided in 1800, not very long after the statute was passed making it lawful for masters to emancipate their slaves, and was decided by very eminent judges, who had the best opportunity of knowing the meaning and policy of the statute. Judge Roane, though he based his opinion in favor of the claim to freedom in that case on a different ground, and therefore forebore to express a definitive opinion in regard to the application of the rule in question to that case, yet seemed to think that it was not applicable to the case. "It is clear (he says) that neither the particular species of property now in question, nor the case of a remainder-man (if I may so express it) claiming his own liberty, were in the contemplation of the judges, who established the doctrine on this subject; which, therefore, may not apply." The case has never been overruled by any subsequent case; nor has any judge, so far as I have seen, ever questioned its correctness. On the contrary, Judge Stanard, in *Crawford v. Moses*, 10 Leigh 277, 284, while he forebore to express a definitive opinion on the question, because the decision of the case did not require it, yet said, "The inclination of my mind is against the application of that rule respecting the limitation of property, to cases in which property is not fettered but renounced; in which property is not granted, but extinguished." Since the case of *Pleasants v. Pleasants* was decided, more than half a century has elapsed; during which there have been several general revisions of our laws, and two revisions of our state constitution. Yet the doctrine of that case remains untouched by legislation; while the doctrine of prospective emancipation has been expressly affirmed,

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and the doctrine of *Maria v. Surbaugh* overruled or changed in favor of the claim to freedom. I am therefore of opinion that *Pleasants v. Pleasants* ought to govern this case.

It cannot be said that the testator intended to violate the law or its policy. He seems to have intended, *bona fide*, to avail himself of the power which the act of 1782 conferred upon him, to emancipate his slaves. When his will was made in 1796, and when it was recorded in 1798, there was no law requiring emancipated slaves to leave the state. Such a law was not passed until 1806. What the law authorizes cannot be said to be against its policy. He intended to emancipate Nancy and her future increase, but the convenience of his family required that she should continue in service for twenty years after his death; and he therefore so directed. He would probably have directed that her increase should be free at the same time with her; but he wished to afford a just indemnity to his legatees for the expense of raising such of her children as might be born while she continued in service; and he therefore subjected such children, and their increase born under the like circumstances, to a limited period of service. Had he directed the mother and her increase to be free at the same time and at the end of twenty years, they would all have been entitled to remain in the state as free persons. By subjecting a portion of the increase to a term of service, he did not keep them in the state contrary to law, nor place them in a condition in which they would be more apt to injure the community than they would be in a condition of freedom. That intermediate condition between free persons of color and slaves, which, in the case of *Wynn v. Carrell*, 2 Gratt. 227, is said to be "a condition unknown to the laws and contrary to their policy," refers to the condition of a person who at the same time is partly bond and partly

free; and not to the condition of a slave entitled to future freedom, who, until the right to freedom accrues, is, to all intents and purposes, a slave; insomuch that, if a female, her issue born before that event were, under the law which existed before the Code took effect, absolute slaves for life.

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There is perhaps another ground upon which the plaintiff might be entitled to her freedom, even if not so entitled on the principle of the case of *Pleasants v. Pleasants*. The testator's general or paramount intent seems to have been to emancipate the mother and her future increase. He had also a particular intent; to subject some of the increase to a term of service, as a merely incidental means of indemnity for their support. "It is definitively settled as a rule of law (says Lord Eldon in *Jesson v. Wright*, 2 Bligh's Par. R. 1,) that where there is a particular and general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent." The general or paramount intent in this case was lawful, and ought it seems, to prevail, notwithstanding the particular intent, in whole or in part, may be unlawful. That view would make the increase, as to whom the particular intent might be unlawful, free from their birth.

But both intents ought to prevail, if possible. The principle of *Pleasants v. Pleasants* will give effect to both, without violating the law or its policy, at least as it existed at the death of the testator; and I therefore rest my opinion on that principle.

I am for reversing the judgment of the Circuit court with costs, and giving judgment for the plaintiff.

DANIEL, J. This case turns on the construction of the 10th clause of the will of Joseph Pierce. In the first clause of the will he bequeaths a number of slaves, with the future increase of the females, to his daughter Mrs. Templeman. In the eighth he states that he had

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set certain other of his slaves at liberty, and expresses the desire that they shall continue so. In the ninth he says, of certain others, that "they are to be at liberty at the expiration of five years;" and of others, that "they are to be freed at the time I shall mention;" and then proceeds to specify the different periods at which the several slaves last mentioned shall be set at liberty; and among them is a female slave Nancy, who is to be set at liberty at the end of twenty years.

The tenth clause then proceeds, "It is my further desire, that if any of the above named female negroes mentioned in this my last will, shall have children while they continue in servitude, it is my will that the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall all become free."

Fanny Wood, the petitioner, is the child of Julianna, who was the child of the Nancy mentioned in the ninth clause of the will. Julianna was born before her mother Nancy attained the age of twenty, and Fanny was born before her mother Julianna attained the age of thirty-one; and Fanny had attained the age of thirty-one before the institution of her suit.

In considering her claim to freedom, two enquiries at once present themselves.

1. Are the grand children or remote descendants of Nancy embraced by the provisions of the 10th clause of the will?

2. If not so, can Fanny assert a right to her freedom as the legal consequence of the *status* of her mother?

It will be more convenient to dispose of the last question first.

And in doing so, it is but proper to note that the language used with regard to the children is slightly variant from that used in regard to their mothers.

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The slaves mentioned in the ninth clause are "to be freed," "to be set at liberty," at the periods therein prescribed; and by the tenth clause, if any of the females shall have children while "*they continue in servitude,*" the children "*shall serre until they shall become of the age of thirty-one years, and no longer.*" I think, however, that when we look at the whole scheme of the testator, as developed in these two clauses, it is apparent that it was the purpose of the testator to place the children exactly in the same condition until they attained the age of thirty-one years, with that prescribed for the *mothers*, until *they* attained the age of twenty years. What was that condition?

In the case of *Pleasants v. Pleasants*, 2 Call 319, Judge Roane construed such bequests as conferring a complete right to freedom, with a postponement as to the time of its enjoyment. Persons so situated were, he held, "in the case of persons bound to service for a term of years, who have a general right to freedom, but there is an exception out of it by contract or otherwise." This view, however, did not prevail in the case of *Pleasants v. Pleasants*, and is condemned by repeated decisions of this court.

In *Maria v. Surbaugh*, 2 Rand. 228, the testator bequeathed Mary (the mother of Maria) to his son, with a declaration that she should be free as soon as she arrived at the age of thirty-one years, saying nothing as to the increase. Maria was born after the death of the testator and before her mother attained the age of thirty-one years. The court there held that the idea that Mary was free from the death of the testator, and only held to service till she attained the age of thirty-one, was wholly inconsistent with the obvious intention of the testator. The will declared her to be free only when she should arrive at the age of thirty-one years; and until she attained that age she remained a slave. And the rule with respect to the increase is

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thus briefly and clearly stated by Judge Brooke: "Their claim (he said) is to *liberty* and not to *property*. The rule *partus sequitur ventrem* is a rule of *property* not of *liberty*, applicable to questions of property decided by this court, and has no application to the question now to be decided. The rule that the children shall be bond or free, according to the condition of the mother, is a rule of a different character, and has received a different exposition. It imports the condition at the *time* of the birth, in exclusion of any future right to liberty. It does not include a remote event which may never happen, nor any right of which the mother is not in the enjoyment at the time of her birth." And Maria was held by the whole court (consisting of Brooke, Green and Cabell) to be a slave.

The same construction has been given to like bequests, and the same rule applied to those claiming freedom under them, in the cases of *Crawford v. Moses*, 10 Leigh 277; *Henry v. Bradford*, 1 Rob. R. 53; *Ellis v. Jenny*, 2 Rob. R. 517.

And I can see nothing in the case of *Isaac v. West's ex'or*, 6 Rand. 652, at all at variance with these decisions. In that case, the deed in terms spoke of present manumission; and its plain intent and effect were, as was said by Judge Green, (the other members of the court concurring,) to renounce all the right and title of the grantor as master from the moment of the execution of the deed, reserving a right to claim the *personal services of the slaves to himself only*, as a condition of the emancipation. If the condition to serve the grantor (the judge said) was against law as inconsistent with the right granted, it could not frustrate the grant. And as by the terms of the grant the mother was entitled to present freedom, her child born after the execution of the deed was necessarily free at the moment of its birth.

The bequest to Nancy and her children was, I think,

plainly not a bequest of freedom, with a condition annexed of serving for certain terms of years, but a bequest of freedom at the end and expiration of the periods specified in the will. The case then, therefore, so far as it depends on the solution of the enquiry which we have been considering, is ruled by *Maria v. Surbaugh*. Fanny being born before her mother's right to freedom accrued, in other words, whilst her mother was a slave, is herself a slave, unless her right to freedom can be made to appear in the answers to be given to the first enquiry, and to such other questions as may necessarily arise out of its consideration.

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The counsel for the appellee argues, that the words of the will may be fully satisfied by confining the bequest of freedom to the children of those mentioned in the ninth clause. I do not think so. We cannot so restrict the operation of the will without violating one of the cardinal rules for the interpretation of such instruments, and treating, as idle, language adequate to the expression of a most important purpose. The addition of the words "and so on until they shall all become free," was not essential to the completeness of the bequest in favor of the children. The intention in respect to them had already been plainly expressed: And the obvious design of the testator in the use of these additional words was to extend the bequest of freedom to the children of the children and their descendants to the remotest generation, all of whom are, in the same manner, with the children, to be free as they severally attain the age of thirty-one years.

The case does therefore fairly present for our decision one of the questions involved in the case of *Pleasants v. Pleasants*, before cited, viz: Whether such a bequest falls within the influence of the rules relating to perpetuities, and restricting executory bequests to certain limits.

The clause of the will of John Pleasants, under

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which the question in that case arose, was as follows: "My further desire is, respecting my poor slaves, all of them as I shall die possessed with, shall be free if they choose it, when they arrive to the age of thirty years, and the laws of the land will admit them to be set free without their being transported out of the country—I say all my slaves now born or hereafter to be born whilst their mothers are in the service of me or my heirs, to be free at the age of thirty years, as above mentioned, to be adjudged of by my trustees their age." And the court decided, that so far as the freedom of the slaves was made to depend on the subsequent passage of a law authorizing their emancipation, it would be too rigid to apply to the case the rule respecting the limitation of the remainders of a chattel upon too remote a contingency with all its consequences; but that a reasonable principle ought to be adopted to suit its peculiar circumstances; and that such a limitation was good in the event of the passage of the law while the slaves remained in the possession of the family, without change by the intervention of creditors or purchasers. And therefore, as the law had passed, that all of the negroes who at the date of the decree were above the age of thirty years, were free; and that all who were then under the age of thirty, and who were born before their mothers had attained that age, and all their future descendants born before their mothers had attained the age of thirty, should be free when they severally arrived at thirty years of age.

It must be admitted that the precise question under consideration was necessarily decided in the decree rendered in that case. The court, however, who rendered it was composed of but three members, and the decree was in fact the decree of but two of the number.

Judge Roane was of opinion that even if the claim of the paupers to their freedom should be treated as

that of ordinary remaindermen claiming property in them, it could not be defeated on the ground of the remoteness of the event of the passage of the law on which it depended. After stating that the utmost limits allowed by law for the vesting of an executory bequest was the term of a life or lives in being, and twenty-one years after, and admitting that it was a fixed canon of property which should not be lightly departed from, and that an executory bequest was only good when the event must happen, if at all, within the prescribed limits, as he proceeded to apply the rule to the case, and said "the passing of a law to authorize emancipation standing singly, is too remote, as it may not happen within a thousand years. But when the testator goes on further and means the benefit of it to persons in *esse*, (for they are the objects of his bounty, and unless it happened within their lives, it might as well, as to them, not happen at all,) this restrains the happening of the contingency, and makes the executory devise good, at least as to all who are within the legal limits."

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Judge Pendleton, on the other hand, was of opinion that if the claim of the paupers was to be governed by the rules with respect to the limitation of chattel interests, it could not be sustained. "To consider (he said) this freedom in the light of a limitation of the remainder of a chattel upon a contingent event, it would seem to assimilate to the case of such remainder limited over upon a general *dying without issue*, and therefore void; since the legislative permission might never be given; might be afforded one hundred years after; or at any earlier period. And the will in the other case is allowed to be the rule of judgment unaltered by the event, although the *dying without issue* shall happen in a reasonable time; all being involved in one fate." He then proceeded to express the opinion that it would be too rigid to apply the rule to the

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case without assigning any other reason than that it was one of a claim to freedom and not to property.

Judge Carrington, on this branch of the question, observed, "I think that these devises are sustainable and not liable to the rule respecting chattel interests, limited on more remote contingencies than the law allows. For the subjects of the devises are different; inasmuch as in the devise of chattels property only is concerned; but liberty is devised in this case. Both sacred rights indeed; but the rules of limitation not necessarily the same with regard to them."

In regard to those not in *esse* at the time of the passage of the law, Judge Roane was of opinion that they were free from their birth, because descended from persons who became free on the passage of the law, and who were thereafter in the condition of apprentices or persons bound to a temporary service. This view of the subject, he said, dispensed with the necessity of his considering whether the doctrine of perpetuities could apply to cases where human liberty is challenged. "It is clear, (he proceeded to remark,) that the restraints rightly imposed on the alienation of inheritances to prevent perpetuities are founded principally if not solely on considerations of public policy and convenience: That these restraints have gradually been extended to terms for years and chattel interests, and that the utmost tolerable limits in such cases have not been settled, till after much investigation and a considerable lapse of time. It is also clear that neither the particular species of property now in question, nor the case of a remainderman (if I may so express it) claiming his own liberty, were in the contemplation of the judges who established the doctrine on this subject; which therefore may not apply. But this is an extensive question, and if it were necessary to be now decided, (but it is not,) it would be proper to weigh the policy of authorizing or encouraging

emancipation (a policy which has certainly received in many instances, and partly by the act of 1782, the countenance of the legislature, at least from the era of our independence, and which must always be dear to every friend of liberty and the human race,) against those secondary considerations of public policy and convenience, which appear to have supported and established the doctrine of the law on the subject of perpetuities, as relative to ordinary kinds of property." The two other judges held that the negroes in *esse* at the passage of the law became free only on attaining the age of thirty years, and that their children born before the last mentioned period, and their descendants born before their mothers arrived at the age of thirty years, would be free also on arriving at that age; but they assigned no reason for holding (as they necessarily did in their view of the case,) that the doctrine in regard to perpetuities could not be applied to bequests of freedom, however remote.

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From this exhibition of the opinions of the judges, it is manifest that the decision in *Pleasants v. Pleasants* is of no binding force in the adjudication of the question under consideration: And I know of no other case in this court, and of none in the courts of any other of the slave states, in which the precise question has been expressly decided. It is true that in the cases of *Elder v. Elder's ex'or*, 4 Leigh 252; *Erskine v. Henry*, 9 Leigh 188, and *Lucy v. Cheminant's adm'r*, 2 Gratt. 36, the increase of females entitled to freedom at the expiration of a number of years, or on the termination of a particular state, born during the limited servitude of their mothers, succeeded in the assertion of their claim to freedom. But in each case the claim of the increase was sustained under the provisions of a will construed to embrace them; and in each case the time, at which their right to freedom under the will would accrue, was within the limits allowed to

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executory bequests. In each case the bequest was such, that had it been a *bequest over* of the increase *as property*, instead of a *bequest of their freedom to themselves*, it would have been good. These cases therefore do not rule the question before us.

In the case of *Crawford v. Moses*, before cited, the question seems to have been discussed at the bar; but the report does not furnish us with any note of the argument. The case was however decided on other grounds, and none of the judges, except Judge Stanard, gave or intimated any opinion on the question. Judge Stanard said, that the inclination of his mind was against the application of the rule respecting executorial bequests of property to cases in which property is not fettered but renounced; in which property is not granted but extinguished. But he further said, that he had formed no definitive opinion on the question.

In this state of things we are left free to consider the question untrammeled by any authoritative decision. And in doing so it is obvious to remark that bequests of freedom do in some respects differ from bequests of property: For no man can enjoy or acquire a right of property in himself. But it does not thence necessarily follow, that in considering the legal effect of testamentary efforts to emancipate, we are to regard testators as freed from all the restraints that control the disposition by them of their slaves as property. In the exercise of the right, recognized or granted by the legislature, to free their slaves, the owners are not at liberty to disregard the rights of others or to violate well established rules of law. Their power over the subject of emancipation is not unlimited. Slaves are property: And we shall find numerous instances in which the courts have held that bequests to them of their freedom were not only subject to the laws which protect the rights of third parties, but also to those

general principles of public policy regulating the transmission and acquisition of property.

Thus, by the act of 1792, emancipated slaves are, by express provision, made subject to the debts of the owners, contracted before the emancipation is made. But in a case arising under the act of 1782, in which there is no such provision, this court held that such was the law, independent of legislative enactment. *Woodley v. Abbey*, 5 Call 336, 342. Judge Roane said that at the time of the passage of the act of 1782, the owners of slaves, though entirely free from debt, were not permitted to emancipate them except in a particular mode, and for meritorious services. It was deemed even as between master and servant, and in relation to the safety and policy of the state, improper that this should be done. A degree of liberality (he proceeds) however, began to manifest itself in favor of human rights at this epoch, and the act of 1782, in which the former policy of this country was relaxed, was the result. The mischief complained of was that conscientious persons were not permitted, even as between master and servant, to emancipate their slaves; and the act ought to be taken as only commensurate with this evil. The boon (he further observes) was not easily and readily obtained: And it is certain that the extension of the request, to the disregard of the rights of creditors, would have endangered and rendered abortive the request altogether. The right to emancipate (he concluded) must be subservient to the well acknowledged principles of law and justice, preferring the creditors to all voluntary donees.

But it is not in this class of cases only that the rules respecting bequests of property have been applied to testamentary emancipation. We shall find that the courts have applied them in cases very similar to the one in hand. Thus, in the case of *Williams v. Ash*, 1 How. Sup. Ct. R. 1, the testatrix by her will gave

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certain slaves to her nephew, with a proviso that he should not carry them out of the state of Maryland, or sell them to any one; in either of which events, the negroes were to become free for life. The nephew sold one of the slaves, and the question was whether the slave was not thereupon entitled to his freedom?

Chief Justice Taney, in delivering the opinion of the court, after stating that by the laws of Maryland, as they stood at the date of the will and at the time of the death of the testatrix, any person might by deed or will declare his slave to be free after any given period of service, or at any particular age, or upon the performance of any condition, or the event of any contingency, proceeded to observe, "The contingency upon which the petitioner was to become free must, by the terms of the will, have happened in the lifetime of G. T. Greenfield; and if he had died without selling him or conveying him out of the state of Maryland, the petitioner would have continued a slave for life. *The event, therefore, upon which he was to become free, was not too remote.*"

"It is said, however, that this was a restraint or alienation inconsistent with the right of property bequeathed by the will. But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold or removed out of the state by the first taker, it is evident, upon common law principles, that the limitation over would have been good. *Now, a bequest of freedom to the slave stands upon the same principle with a bequest over to a third person.*"

And in the case of *Harris v. Clarissa*, 6 Yerg. R. 227, the court, in rendering its opinion, stated, as an objection to a particular construction of the will contended for at the bar, that such a construction would result in a perpetuity of slaves for a term of years.

And in the case of *Peggy v. Legg*, 6 Munf. 229, the

testator bequeathed his slaves (in the year 1790) severally to his children, with a proviso, "that none of them be sold out of the families to whom devised; if offered for sale by any of them out of the family of my wife, my daughter and sons, that they be immediately liberated, and I do hereby desire they may be free to all intents and purposes." A son of the testator, to whom a female slave was bequeathed, being in possession by virtue of the bequest, died intestate, and she came into the possession of a *grand daughter*, by whose husband a child of the said slave was sold to a *stranger*, to be carried out of the state. It was decided that said child was not entitled to her freedom. No reason was given by the court for its opinion; but in the argument of the case, the counsel for the pauper contended that the right to emancipate by will was given by act of assembly, and that the claim of the pauper was under a will emancipating on a condition which had actually happened; that a condition not to alienate except to particular persons was good; that the condition in the will, therefore, was not repugnant to the estate; and that if it were, it would still be good, for that the law allowed the *destruction of an estate in slaves*. They argued further to show that the contingency was not too remote; and they relied on *Pleasants v. Pleasants* to show that bequests of freedom to slaves are not subject to the restrictions concerning bequests of chattels on remote contingencies. Yet the court unanimously affirmed the judgment of the court below, denying the claim.

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If the opinion of Chief Justice Taney in the case of *Williams v. Ash*, just cited, (in which the whole court concurred,) be correct, it is obvious that the decision in *Peggy v. Legg* cannot be sustained except on grounds utterly at war with the main principle on which the case of *Pleasants v. Pleasants* rests. For in that view this court must have rejected the claim of Peggy on

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no other ground than that the contingency on which her freedom was made to depend was too remote.

I regard the case as a strong one in support of the proposition that the legislature did not mean to exempt bequests of freedom from the influence of the well settled and wholesome restraints imposed on bequests of property. And I cannot perceive the force of the arguments pleaded in behalf of such exemption.

The right to emancipate slaves is by the law conferred upon those upon whom only it could have been properly conferred, viz: upon their masters and owners. The right in the owner, under the sanction of the law, to give freedom to his slave, springs out of his ownership and control over him as property. His right is to emancipate *his* slave. And in what legal sense can a bequest of freedom by a testator to a slave to be born centuries hence, be called a bequest of freedom to *his* slave? The control of the testator over his slave terminates at a period fixed by the law. Is he not, to all intents and purposes, seeking to exercise that control when he undertakes to declare that the slave shall thenceforward be free? Let it be that the emancipation of a slave is to be treated as a renunciation or destruction of property. Still, does not the renunciation of a right necessarily imply the existence of it in him who renounces? And who else, besides the owner, can lawfully undertake to destroy property or the rights of property?

A bequest of slaves and their increase to the child of the unborn child of a stranger would be void. But a bequest of freedom to the remotest descendants of slaves, it is said, violates no rule. The legatee, it is true, in the latter case, does not receive property. But is not the act of emancipation, so far as the testator is concerned, a granting away of property or of the rights of property? Indeed, so far as the testator is concerned, it is not only a granting away of his

rights of property, but it is something more. The renunciation of his right is accompanied by a declaration, which has the effect to transmute the right of property formerly held by himself, into a right to personal freedom, to be thenceforward enjoyed by the slave. The act of emancipation, in fact, must, from its very nature, (if justly made,) proceed from one who not only owns the property in the slave, but who also, for the occasion, represents the sovereignty of the state. For, as was very justly remarked by Catron, J. in *Fisher v. Dabbs*, 6 Yerg. R. 125, "manumission is an act of sovereignty just as much as naturalizing the foreign subject. The highest act of sovereignty a government can perform is to adopt a new member, with all the privileges and duties of citizenship. To permit an individual to do this at pleasure, would be wholly inadmissible." And in the case of *Thrift v. Hannah*, 2 Leigh 300, 319, Judge Brooke said, "that it was one of the highest acts of sovereignty to elevate a slave from his degraded state to the rank of a freeman."

So far, I have been considering the case upon the supposition that the law allows prospective emancipation. In the view, however, which I take of the provisions on the subject, I have not been able to bring my mind to the conclusion that prospective emancipation was in the mind of the legislature at all. I concur with Judge Brooke in the opinion expressed in *Thrift v. Hannah*, and with Judge Tucker in the views presented by him in the case of *Crawford v. Moses*. The act of 1782 looks obviously to gifts of freedom *in presenti*, and makes no provision for the probat of deeds and wills conferring future freedom. It declares it lawful for any person, by his last will, or by any other instrument in writing under his hand and seal, attested and proved in the county or corporation court by two witnesses, or acknowledged by the party in the court

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of the county where he resides, to emancipate his slaves, *who shall thereupon* be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been *particularly named and freed by this act*. No language could well have been employed showing more plainly than the terms used, that the emancipation contemplated by the legislature was to be complete on the probat of the deed or will conferring freedom, and consequently that the legislature were providing only for the probat of such instruments as were designed to effect immediate manumission.

So again, the act provides that all slaves so emancipated, not being, in the judgment of the court, of sound mind and body, &c. are to be supported and maintained by the person so liberating them, or by his estate; and that in case of neglect to do so the sheriff of the county, by order of the court, is to distrain and sell so much of such person's estate as shall be sufficient for the purpose. This provision also looks plainly to a state of things arising on an act of immediate manumission, and has no reference to gifts and bequests of freedom, to take effect at a remote period, when in the nature of things, there can be no estate of the grantor or testator in the control of the court.

So again, the clause requiring that the person emancipating, if by written instrument in his lifetime, or his executor, if by will, shall deliver to the slave a copy of the instrument of emancipation, attested by the clerk, who is to receive a fee for the same, to be paid by the person emancipating, looks obviously to immediate emancipation.

If the act of 1782 could be regarded as one proceeding from a legislature convinced of the evil of slavery, and providing for its gradual removal by encouraging voluntary emancipation by the owners of slaves, there would be strong motives and arguments

on which to rest that construction of the act which allows of future manumission and discards the restraints imposed on donations and bequests of property, to take effect on the happening of remote events. So to construe the act as to suppress the supposed mischief, and to advance the remedy, would then be the leading duty of the courts in administering the law. And such would seem to have been the views entertained by some of the judges in the earlier cases.

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I cannot, however, perceive anything in the provisions of the act justifying such views of its origin or purpose: And when we look to its history, as given by Judge Roane in *Woodley v. Abby*, it is, I think, made most apparent that it was passed not to invite and encourage the liberation of slaves, but was granted as a reluctant concession to the conscientious scruples of the owners of slaves who, by the existing laws, had no power to free them except for meritorious services. And without further specific reference to the history of our legislation, I think it may be safely affirmed, that there are few states which have more fully acknowledged the wisdom of restraining within reasonable limits prospective limitations of property, or shown a greater repugnance to every disposition of it, savoring of a perpetuity, than this; few which have shown a more lively sense of annoyance at the presence of its free negro population or a greater anxiety for its removal; and none in which the legislature have manifested a firmer or more consistent purpose to uphold and cherish the institution of slavery.

Entertaining these views, I cannot discover in the act of 1782 any warrant for supposing that it requires the court to disregard well established general rules in order to give effect to bequests of freedom that cannot be sustained without their violation.

Instances of prospective emancipation, as well by will as by deed, have however so frequently received

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the sanction of this court, that it is now no longer in its power to retrace its steps. Still believing as I do that the doctrine had its origin, (to use the language of Judge Brooke) "in the spirit of humanity, rather than in the spirit of the law," I feel under no obligation to extend it to any class of cases in which it has not been already established by authoritative decisions.

The case of *Pleasants v. Pleasants*, is as yet the only case in which a bequest of freedom to take effect on an event or at a period more remote than that which a testator is permitted to extend his control over the slave as property has been sustained. The case is of no force *as authority* in this particular, and I have endeavored to show it is not a *correct exposition of the law*. I do not feel bound to follow it. It violates, as I conceive, a wise and well established principle, and gives unlimited reach to a doctrine pregnant with mischief to the best interests of the state. The love of property, the sense of the duty to provide for the wants and comforts of their own families, and the liability to have their estates subjected to the maintenance and support of such freedmen as are unable, from mental or bodily infirmity, to support themselves, might so far operate to restrain the owners of slaves in their use of a power to grant *present freedom*, as to render the power thus restricted productive of no serious evil.

In recognizing the doctrine of *prospective emancipation*, this court has, I think, already done much to weaken and impair the force of these restraints. Still, no binding precedent has as yet placed the power wholly beyond the reach of such influences. If, however, we recognize the claim now asserted, we free the exercise of the power from all restraint; we necessarily declare that no event is too remote, no period too distant, for the vesting of gifts and bequests of freedom. Under the law so construed, every owner of slaves

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may first carve out of his estate in them and their increase an interest for the benefit of himself and his family, nearly equal in value to the absolute estate, and bequeath to the remote descendants of the slaves their freedom, to take effect at a period far beyond the limits to which his control over them as property can extend. Thus first reaping all the benefits which he or his family could by law derive from the slaves as property, and then, without any liability, visiting the commonwealth with all the evils which flow from their presence as freemen. Such a power is adequate to the defeat of the whole policy of the state in regard to its slave and free negro population; and no act of the legislature ought to be taken to confer it, unless couched in terms necessitating such a construction. We cannot, in my opinion, sustain the claim of the petitioners, without recognizing the existence of such a power. I cannot consent to do so, and am for affirming the judgment.

ALLEN, P. I do not regard the case of *Pleasants v. Pleasants* as of itself a binding authority, it being the decision of a majority only of a bare court. The right to emancipate *in futuro*, one of the principles affirmed in that case, has been frequently recognized since; and though I think it was an erroneous construction of the statute, the legality of such prospective emancipation cannot be questioned at this day. But I do not understand any of the subsequent cases as having affirmed the right of the master to attach a condition or quality to slaves so to be emancipated *in futuro*, which will follow their posterity through all succeeding generations. Regarding them as property merely, such a principle would violate the doctrines of the law against perpetuities. But looking at them as human beings, and the act as one by which they are to be elevated into the condition of free persons, I think

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there is nothing in the statute which empowers the owner of slaves to create this new *status*, by which his slaves and their posterity through all time shall occupy this anomalous position of being slaves up to the prescribed age, and free persons thereafter.

Under the decisions of this court, the issue of the slaves prospectively emancipated by the will, born before the period of emancipation arrived, were born the slaves of his estate, and if not emancipated, would have been slaves for life. The will shows that the testator so regarded them, and did not intend to leave them to pass to his distributees as so much property undisposed of, or to bequeath them as property to others. On the contrary, I think the leading intent was to emancipate them as well as their parents, and that the words used do emancipate them. A condition and quality was annexed contrary to the principles of the law in regard to perpetuities, and against the policy of the law in reference to this portion of our population; creating a distinct class intermediate between slaves for life and free persons through all future time, which, it seems to me, nothing but an express act of the legislature could effect. The condition, I think, was void as against law, and inconsistent with the grant of freedom. I think, therefore, that all the descendants of the slaves born after the death of the testator, were either born free, or entitled to their freedom when their ancestors in existence when the will took effect became entitled to freedom. I incline to the opinion that such after born descendants were free at the time of their birth. In either event, the appellant was entitled to freedom, and I therefore concur in the reversal of the judgment.

LEE and SAMUELS, Js. concurred in the opinion of MONCURE, J.

JUDGMENT REVERSED.

Richmond.SNODDY *v.* HASKINS & *als.*

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(Absent ALLEN, P.)

May 14.

1. The act, Code, ch. 149, § 13, p. 593, limiting the period in which suits may be brought to set aside conveyances or transfers of property, on considerations not deemed valuable in law, does not apply to cases of actual fraud.*
2. A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defense of purchaser for value without notice.
3. In such case the husband having obtained slaves by a conveyance fraudulent as to the creditors of the grantor, and one of these slaves having been allotted to the widow, the slave in her possession may be taken in execution at the suit of a creditor of the grantor, though the husband and those claiming under him have been in possession of the slave more than five years.
4. The execution is for less than five hundred dollars, but the slave is allotted to the widow at a valuation above that sum. She having obtained an injunction to the sale under the execution which is afterwards dissolved: QUERE: If the Supreme court of appeals has jurisdiction of the case.†

In November 1852, Martha L. Snoddy obtained an injunction to restrain the sale of a slave in which she

*The act says, "No gift, conveyance, assignment, transfer or charge, which is not on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless within five years after it is made suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor as to whom such gift, conveyance, assignment, transfer or charge is declared to be void by the second section of the one hundred and eighteenth chapter."

†The act, Sessions Acts 1852, ch. 61, § 9, p. 53, after stating a specific ground of jurisdiction in the court, adds, "or in any civil cause where the matter in controversy, exclusive of costs, is not less in value than five hundred dollars."

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claimed a life estate, and which had been levied upon under an execution issued in the name of Haskins and Terry against William M. Tyree for two hundred and sixty-three dollars, with interest thereon from the 19th of February 1841, until paid. In her bill she stated that Robert W. Snoddy died in 1845 intestate, leaving her his widow and three children. That John C. Snoddy qualified as administrator upon his estate; and in 1849 he had a division of the estate under an order of the County court of Buckingham, when certain slaves were allotted to her, among which was a man named Shadrick, valued to her at six hundred and fifty dollars. That long since the division, to wit, in 1852, Haskins and Terry levied an execution on said slave as the property of William M. Tyree, and had executed an indemnifying bond to the sheriff for the purpose of having said slave sold under their execution, upon the pretense that Robert W. Snoddy had come into possession of the slave by a fraudulent purchase from Tyree. That she knew nothing of the purchase; but had heard that Tyree was largely indebted to her husband, and in part payment of said debt had sold him the interest of said Tyree in certain dower slaves of which his wife was entitled to a share, and had executed a deed of trust on other slaves to secure the balance of said debt. That afterwards the trustee had sold the slaves, and that her husband had purchased them. That this sale was made in 1842: That the slaves had been in possession of her husband for several years before his death, and of his representative and herself ever since, a period of ten years; and she relied upon the length of possession to protect her in the possession of said slaves.

She insisted further that if she was to be deprived of this slave, she was entitled to be reimbursed by the distributees of Robert W. Snoddy. And making Haskins and Terry, the administrator of Robert W. Snoddy,

and his distributees, parties defendants, she prayed for an injunction to restrain the sale of the slave, and for general relief.

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Haskins and Terry alone answered the bill. They admitted that Robert W. Snoddy died in possession of the slave Shadrick; but denied that he was ever the property of Snoddy, or had ever been claimed by him as such. They say that a short time before Snoddy's death he admitted that this and the other slaves of Tyree held by him were held upon a secret trust for Tyree, to be returned to him whenever he came back to Virginia. They charged that at the time Tyree made the deed of trust, he was considerably indebted, though not to the value of his property; that he did not owe to Snoddy the amount stated in the deed; and that the deed was made to hinder and delay the creditors of Tyree. And they say they have been informed that although John C. Snoddy qualified as administrator of Robert W. Snoddy in 1845, and settled his administration account in 1846, he never would have any of these negroes appraised as part of the estate until December 1849.

There was proof that Robert W. Snoddy repeatedly admitted that Tyree, who had left the state, was to have the slaves again when he returned, and that Robert W. Snoddy was to hire out the slaves, and when Tyree's debts were paid from the hires, they were to be returned to him.

When the cause came on to be heard, the court held that although the plaintiff was entitled to contribution from the distributees of Snoddy, yet that the conveyance was fraudulent as to Tyree's creditors; and dissolved the injunction. And from this decree the plaintiff applied to this court for an appeal, which was allowed.

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Irving and Johnston, for the appellants.
The Attorney General, for the appellees.

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SAMUELS, J. A question is made whether this court has jurisdiction to try this cause under the statute, Sessions Acts of 1852, p. 53, § 9. The slave, on which the execution is levied, is alleged to be of the value of six hundred and fifty dollars; but the debt, interest and costs, for which the execution issued, make an amount less than five hundred dollars. It has been said that the appellant, and those having the like interest with her, may relieve the slave from the lien of the execution, by payment of a sum less than five hundred dollars; and further, that the price of the slave, if sold, being first applied to discharge the execution, the residue will go to the appellant; that thus the only amount in controversy is the amount of the execution. The reply to these objections I conceive to be obvious and conclusive. The appellant sought by injunction to restrain the sale of a slave under an execution for the benefit of the appellees Haskins and Terry; the slave is alleged to be worth six hundred and fifty dollars; if the appellee had not been restrained they would have caused the slave to be sold; thus the complainant, if her right be good, as alleged, is in danger of having the slave converted into money. If complainant would be able at law to recover every dollar for which the slave may sell, or to recover his real value, without regard to the price sold for, or to recover the specific slave, still the remedy by injunction is appropriate. At one time it was held in this court that an injunction to a sale of slaves could not be sustained, unless it was averred and proved that such slaves were of some peculiar value, for which money would not be an adequate compensation. *Allen v. Freeland*, 3 Rand. 170; *Randolph v. Randolph*, 6 Rand. 194. More recent decisions, however, have settled the law otherwise. *Harrison v. Sims*, 6 Rand. 506; *Sims v. Harrison*, 4 Leigh 346; *Kelly v. Scott*, 5 Gratt. 479. If, then, the object of retaining a specific slave, rather than receive his

value in money, or to recover him by suit at law, be
in itself a cause of suit in equity, the appellant is
rightly before this court. If she have a title to this
slave, she may assert it, and this without reference to
the amount of money the appellees may propose to
give her in *lieu* of him.

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If appellant have the better right, it is error to give
her that right, upon terms of paying money, however
small in amount; she should not be put to an election
to give up such better right, or to enjoy it upon con-
dition of paying money not properly chargeable upon
the subject. I am of opinion the court here has juris-
diction to try the cause: The court of four members,
however, being equally divided in opinion on the ques-
tion, the decision must be regarded as settling the law
of this case only.

The merits of the case I hold to be with the appellees. The deed of trust given by Tyree to secure a pretended debt to Robert C. Snoddy, and another pretended debt to John C. Snoddy, was made with ex-
press intent to delay, hinder and defraud Tyree's creditors. The sale by the trustee and the purchase by Robert C. Snoddy was but the second step in the plan of fraud concocted between Tyree and Robert C. Snoddy. Although this deed and the sale under it may bind the parties to the fraud, yet as against Tyree's creditors, they have no effect whatever. After Snoddy's death his administrator succeeded to the title of his intestate, to be applied in the due course of administration; this title, as already said, was good against Tyree, but void against his creditors. I do not understand the appellant's counsel to insist that this succession of itself gave the title any additional strength. It is insisted, however, that events occur-
ring since Snoddy's death, have perfected the title held by his distributees; that the possession of the slave for five years by the administrator himself gives

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title under the statute of limitations; or if the administrator held for less than five years, his possession may be added to that of the distributee the appellant, and thus make five years, the limit prescribed by the statute. It is further insisted that the appellant, having received the slave as part of her share in the distribution of her husband's estate, without notice of fraud, must be regarded as a purchaser for value without notice, and be protected as such.

The bar prescribed by the statute, Code of Virginia, ch. 149, § 13, p. 593, cannot be relied on in this case. The legislature thereby intended to protect mere volunteers chargeable with fraud only by construction of law, after five years. But if actual fraud exist, and thereby a creditor have right for a "cause," other than "want of consideration deemed valuable in law," to impeach the transaction, the plain terms of the statute leave this right as it was before the Code was enacted. That the title of Snoddy is tainted with *actual fraud*, is alleged in the answer and shown by the proof; and thus the case is not affected by the statute last referred to.

It is somewhat difficult to understand how and against whom the appellant's counsel propose to apply the statute of limitations. It cannot be against Tyree; his title as between himself and Snoddy had passed by the deed and the sale under it: He had no cause of action which could be asserted at any time. The statute cannot be said to bar a cause of action, if such cause never existed. It cannot be against the appellees Haskins and Terry. If their rights in regard to the property shall be held to date from April 1848, when their judgment was obtained, or shortly thereafter when their execution was issued, five years had not elapsed when the levy was made; and for this reason, if no other existed, it must be held that the statute does not apply. Without pointing out other diffi-

culties in the way of the attempt to apply the statute, I am of opinion to rest the case upon the ground so clearly stated by Judge Leigh in the opinion reported in *Wilson v. Buchanan*, 7 Gratt. 334, 343. Although the case just cited was one growing out of a voluntary conveyance, and thus fraudulent only by construction of law, and although a case like it might now be decided otherwise, under the statute, Code of Virginia, p. 593, § 18, yet at the time it was decided constructive frauds and actual frauds stood upon the same ground, and the decision gave the same rule in regard to both. Actual fraud is not protected by the statute last cited; and thus the authority of that decision applies in all its force to the case before us. Notwithstanding the opinions of some of the judges in the case of *Huston's adm'r v. Cantril*, 11 Leigh 136, the case cited from 7 Gratt. should be adhered to as well because of its intrinsic justice, as of the unanimous sanction given to it by this court.

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The appellant's pretension that she is to be regarded as a purchaser for value without notice is without warrant. This alleged purchase rests upon the single fact that she took this slave as part of her distributive share in her husband's personal estate, thus leaving his value to be applied for the benefit of the other distributees out of the other personal estate. If the distributees were mistaken in regard to the value of the distributable surplus, in holding the slave in question to belong to the estate, the obvious remedy is to correct the mistake, not to perpetuate it. The appellant had her rights in the true surplus only; this surplus, upon the facts appearing in the record, is ascertained by deducting the amount of the lien on the slave from the larger and mistaken amount which had been distributed. By erroneously including this slave the surplus and her interest are made to appear larger than they ought to be.

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The case of *Huston's adm'r v. Cantril*, 11 Leigh 136, relied on by the appellant's counsel, affords no support to the case of their client. If we should concede all that was said by all or any of the judges in that case, yet the facts of this case are so widely different from those in that, as to deprive that case of all weight in the decision of this. In the case from 11 Leigh the conveyance alleged to be fraudulent was made before the marriage, and, as supposed by some of the judges, may in some degree have induced the marriage; in our case it is not alleged that the conveyance was made before the marriage, and it is probable at least, it was made afterwards. In the case from 11 Leigh, the husband claimed, as purchaser by marriage, the absolute title to the slaves; in our case the widow does not claim to have the absolute title but only a life estate in one-third part of her husband's slaves. In our case it is not alleged that marriage entered or could enter into the consideration at all, but the only consideration alleged is the giving up a claim on other portions of the estate, and having received in *lieu* thereof this slave as part of her distributive share. This is the same as to say that distributees, (mere volunteers) of the fraudulent grantee, by foregoing part of a claim on a surplus which includes the fruit of the fraud, in consideration of the property fraudulently acquired thereby, became purchasers. This pretension keeps out of view the fact that the whole personal estate of such grantee may be held liable to make good to creditors any injury done to them by the fraud. In the case before us the alleged consideration and subject of sale might both be held liable to the creditors, if necessary for their indemnity; and it is clearly wrong to permit the distributees to divide the estate into two parcels between themselves, calling one a consideration, the other a subject of sale, and thus withdraw those parcels, or either of them, from their liability to the superior claims of the creditors.

I am of opinion that neither the statute of limitations nor the alleged purchase should prevent the levy of the execution, and that the decree should be affirmed.

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DANIEL, J. concurred in the opinion of SAMUELS, J.

MONCURE and LEE, Js. thought this court had no jurisdiction of the case. But on the merits they concurred in the opinion of SAMUELS, J.

DECREE AFFIRMED.

Richmond.

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WILLIAM & MARY COLLEGE v. POWELL & *als.*

(Absent ALLEN, P.)

May 15.

1. A post nuptial settlement is made by a husband upon his wife. The wife afterwards dies; and then a bill is filed by a creditor of the husband, against her children, to set aside the settlement as fraudulent as to the creditor. The husband is not a competent witness to prove the consideration upon which the settlement was made.
2. Such a settlement is made, which recites that the consideration in part is the agreement by the wife to unite in a conveyance of land, a part of which is her own derived from her father, and in another part of which she has a right of dower, for the purpose of paying a debt of her husband; and she does afterwards unite in the conveyance. The deeds themselves are proofs of the consideration, and the settlement will be sustained to the extent of the value of the interests she conveys.
3. A husband conveys a tract of land, one part of which is his own and the other part is his wife's maiden land, in trust to secure a debt. Afterwards the husband and wife unite in a conveyance of the land to a third person, upon the consideration of five hundred dollars, and that the grantee will pay the debt to secure which the land had been conveyed in trust by the husband. The creditor has an equitable lien upon the land under this last deed, which is good against parties claiming under the grantee. And if the five hundred dollars has not been paid, it will be postponed to the creditor's lien.
4. A trustee sells land and bids it in for the creditor, but no conveyance or memorandum in writing of the purchase is made, nor is possession taken, but the possession remains in the former owner, under an agreement, as it is said, with the trustee, who is the agent of the creditor, that the said owner shall take it at the bid. The purchase is not valid, and the creditor will not be charged with the land at the price at which it was bid in.
5. There is a principal and a surety in a bond; and the principal conveys land to the surety in consideration that the surety will pay the debt. This does not convert the surety into the principal and the principal into the surety in respect to the creditor; so that the original principal may be released by the dealing of the creditor with the original surety.

Thomas J. Powell being indebted to William and Mary college, he executed his bond, bearing date the 25th day of April 1836, with George N. Powell as his surety, to the college, for one thousand five hundred dollars, payable on demand: And on the same day he executed a deed by which he conveyed to Edmund Christian, who was the bursar of the college, a tract of land in the county of King William, described as containing three hundred and nine acres, in trust to secure the payment of said debt. One moiety of this land in quantity, and that part of it on which was the dwelling-house, was the property of Powell's wife, of which he was tenant by the courtesy; the other moiety Powell had purchased of one of the heirs of Mrs. Powell's father. Her moiety was much the most valuable.

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By deed bearing date the 1st of April 1841, Thomas J. Powell and Mary E. his wife, in consideration of the sum of five hundred dollars in cash, and for the further consideration that George N. Powell should pay Christian, agent of William and Mary college, the debt aforesaid of one thousand five hundred dollars, with its accruing interest, conveyed to said George N. Powell the said tract of land, described as containing three hundred and three acres.

In 1841 George N. Powell had become personally indebted to the college; and on the 27th of September of that year, he executed to the college his bond for six hundred and forty-eight dollars and ninety-one cents; payable one-sixth thereof annually, with interest payable annually, from the date of the bond.

In 1846 Christian, the agent of the college, instituted actions on both the above mentioned bonds in the Circuit court of King William county. The process in the first case was not served upon Thomas J. Powell, who had then removed from the county, but it was served on George N. Powell; and judgments were recovered against him.

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Whilst these actions were pending, George N. Powell, by deed bearing date the 6th day of April 1846, conveyed to Frances W. Scott the tract of land which had been conveyed to him to Thomas J. Powell and wife, and describing it as that land, and also other lands, slaves, and indeed all his property, in trust to secure numerous creditors named in the deed. These creditors were divided into three classes. The first embraced a number of persons, to whom he stated he owed small debts, and a debt of five hundred dollars stated to be due to James H. Powell. The second class embraced debts stated to be due to his children, amounting to upwards of four thousand dollars. And the third class embraced the two debts due to William and Mary college. Scott, the trustee, was about to proceed to sell the trust property, when the college obtained an injunction to the sale, from the judge of the Circuit court of King William county: The bill was sworn to by Christian, the bursar of the college. It set out the debts aforesaid due from the Powells to the college, and stated that judgments had been recovered upon them, and that the same were still due. It stated the conveyance by Thomas J. Powell in trust to secure the debt he owed; and the subsequent deed by Thomas J. Powell and wife to George N. Powell, and also the deed of the latter to Scott; and charged that the two last were fraudulent and void as to the college. And the prayer of the bill was for an injunction, and for a receiver. That the said trust deed might be declared void, and the property applied to the plaintiffs' debts, and for general relief.

George N. Powell, in his answer, did not question that the debt of one thousand five hundred dollars was due, but he denied that the deed from Thomas J. Powell and wife to him was fraudulent; and insisted that his deed to Scott did not deprive the college of their lien under the deed of trust from Thomas J.

Powell to secure his debt to the college, but that that land was primarily liable to that debt. He also denied that the deed to Scott was fraudulent, or that the debts stated to be due to his children were simulated.

In November 1847 a decree was made in this cause by consent, by which the property was directed to be sold; and it was provided, that should the plaintiffs become the purchasers of the land conveyed by Thomas J. Powell to Edmund Christian, to secure the debt of one thousand five hundred dollars, the commissioner was to take a written memorandum of the sale signed by the plaintiffs or their agent, without further security, and return the same with his report. Under this decree this land was sold, and was purchased by Christian for the college at seven hundred and two dollars, and the sale was reported to the court: And it does not appear in this record what further has been done in that cause.

By deed bearing date the first day of January 1839, Thomas J. Powell conveyed to James Bosher a tract of between eighteen and nineteen acres of land lying in the county of Henrico near the city of Richmond, four slaves and some household furniture, in trust for the separate use of his wife Mary E. Powell during her life, with a general power of appointment; and if she should make no appointment, to her heirs. And Mrs. Powell was authorized to direct a sale and reinvestment of any part of the trust property. This deed recited that Mary E. Powell was the owner of the tract of three hundred and three acres of land in King William, before mentioned, and had theretofore agreed that it might be sold by her husband, and that she would join in the conveyance thereof, on the condition of a settlement to her separate use of property equivalent therefor; and that with an understanding that the land mentioned in this deed should be thus settled, she did theretofore by the said James Bosher as her next

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friend, out of her own private funds or pin money, pay the sum of six hundred dollars to William A. Carter, in part for the purchase of the same. And upon these considerations, as well as of natural love and affection, the settlement was made. This deed was executed by Thomas J. Powell, Bosher the trustee, and Mrs. Powell. At the time of the execution of this deed Thomas J. Powell was in embarrassed circumstances, and became insolvent.

The land conveyed in the deed of January 1839 was sold by the direction of Mrs. Powell, and the proceeds were invested in a lot in the city of Richmond. Mrs. Powell died prior to 1850, leaving ten children, and without having exercised her power of appointment: And in November 1850 Bosher the trustee conveyed the trust property to her children. He afterwards purchased three of the interests of the children in the property.

In 1851 the parties interested in this property instituted a suit in the County court of Henrico for the purpose of having it sold and divided; and a decree was made appointing Herbert A. Claiborne a commissioner to sell and distribute the proceeds. The sale was made, and the net proceeds of the slaves amounted to one thousand eight hundred and ninety-eight dollars and thirty-five cents. The lot sold for one thousand dollars.

Before the proceeds of the sale aforesaid were paid over to the parties, William and Mary College filed a bill in the Circuit court of Henrico against Thomas J. Powell, Bosher and the children of Mary Powell, in which they state the indebtedness of Thomas J. Powell to the college, and the deed of trust given to secure it, the conveyance by George N. Powell to Scott, and their suit in the Circuit court of King William, the consent decree and their purchase of the King William land; the insolvency of Thomas J.

Powell, and his deed of the 1st of January 1839 to Bosher, the subsequent sale of the land in Henrico, and reinvestment of the proceeds, the death of Mrs. Powell, and the proceedings in the County court of Henrico, as herein before detailed. They charge that the settlement upon Mrs. Powell is fraudulent and void as to the creditors of Thomas J. Powell; and insist that the said property in the hands of the voluntary donees, is liable to satisfy their debts. And they pray that the deed of the 1st of January 1839, and the subsequent deeds made by the defendants conveying that property, may be declared null and void as to the plaintiffs; and that the said property, or its proceeds in the hands of the commissioner Claiborne, may be subjected to satisfy the debt due to them from Thomas J. Powell.

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Bosher answered the bill, and after admitting the facts as to the settlement, as before stated, alleged that after the trust had terminated, and the trust subject had been conveyed to the children of Mrs. Powell, he had purchased the interest of one of the children, which he had afterwards conveyed to Alexander Houchins, who had married a daughter of Mrs. Powell; and that he had afterwards purchased the interests of two other of the children, for which he had received a conveyance. That he had never heard it questioned, until the filing of the plaintiffs' bill, that the settlement was for valuable consideration; and he was still satisfied that there was no reasonable ground for the attempt then made to subject the trust subject.

The children of Mrs. Powell also answered. They insist that the settlement of January 1st, 1839, was for valuable consideration. They state that after the conveyance of the King William land by Thomas J. Powell and wife to George N. Powell, that land was put up for sale by Edmund Christian, as the bursar of the college, when the sum of one thousand seven hun-

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dred dollars was bid for it by a highly respectable gentleman; and that thereafter, Christian bid it in at the price of one thousand seven hundred and five dollars. And they insist that the debt of one thousand five hundred dollars should be credited for this sum.

In February 1853 the cause came on to be heard, when the court directed one of its commissioners to ascertain and report the nature and extent of the consideration paid and surrendered by Mary E. Powell for the settlement made upon her by the deed of the 1st day of January 1839 from Thomas J. Powell to James Bosher.

The defendants introduced before the commissioner Thomas J. Powell as a witness, and he was objected to as incompetent by the plaintiffs, on the ground that he was the husband of Mary E. Powell as well as grantor in the deed. He stated that previous to the execution of that deed, there was an agreement between himself and his wife. That having purchased the tract of eighteen acres of land conveyed in the deed for one thousand six hundred dollars, and finding he could not pay for it by six hundred dollars, and still owing the college a debt, Mrs. Powell told him that she had about six hundred dollars, which she had made from the sale of turkeys, and work, and other savings, which she had been laying up for several years, and that if he would make her a right to this tract of land, she would pay the six hundred dollars, and convey her interest in the land she had inherited from her father, and in some other lands he had bought adjoining the same, for the express benefit of the college. And he stated that the deed afterwards executed by himself and his wife to George N. Powell was intended to carry out this agreement. The witness valued the four slaves conveyed in the deed at from five hundred to six hundred dollars; he stated that slaves then sold very low, and that both the men were confirmed invalids;

and that one of them had been valued when received at fifty dollars, and was since dead. Of the other two one was a woman, and the other her infant. The furniture he valued at about one hundred and ninety dollars. He also stated that Christian informed him that he had purchased the King William land for the college at one thousand seven hundred and five dollars, and that he had let it off to George N. Powell; and that witness told him that he had done wrong, and that witness considered himself exonerated, as he had done that. This sale took place in 1841 or 1842.

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The only witness, beside Powell, who spoke of the purchase of the land by Edmund Christian, was Warner Edwards. He says that Major Christian offered for sale at public auction, at King William court-house, a tract of land formerly owned by Thomas J. Powell, proclaimed by the crier to be the property of George N. Powell. That witness was authorized by Dr. Lemuel Edwards to bid as high as seventeen hundred dollars for him, for the tract of land, which he did, and he was overbid by Major Edmund Christian five dollars; and the land was knocked out to him. That it was the land on which Thomas J. Powell lived at the time he removed from King William. That he considered Dr. Edwards able to pay for the land at the price bid for it: And that the sale was in 1841. The witness knew nothing about the land, and only knew that the crier stated it was the land of George N. Powell.

The commissioner made his report, in which he set out the principles on which he had estimated the value of Mrs. Powell's dower interest in the land of her husband, and also in her maiden land of which her husband was tenant by the courtesy. Mrs. Powell being forty-seven years old and her husband forty-nine; and his land in which she had a dower interest being valued at six hundred dollars, he estimated her

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dower interest at one hundred and sixty-four dollars and seventy-three cents; and her land being valued at fifteen hundred dollars, he valued her interest in it at four hundred and twenty-three dollars and twenty-six cents: the two interests making five hundred and ninety-seven dollars and ninety-nine cents. And if she was to be allowed for the six hundred dollars paid out of her savings, the value of her interest in the trust property would be eleven hundred and ninety-seven dollars and ninety-nine cents. The property conveyed in trust for her, the commissioner estimated at two thousand, one hundred and eighty-seven dollars and nineteen cents, making the sum received by Mrs. Powell more than was surrendered and paid by her, nine hundred and eighty-nine dollars and twenty cents. The commissioner made two statements of the debt due by Thomas J. Powell to the college, in one of which he credited the amount for which the King William land sold under the decree in the suit pending in that county, seven hundred and two dollars; and in the other he credited the sum of seventeen hundred and five dollars, for which sum it was insisted by the defendants, Christian had purchased the land for the college.

The plaintiffs excepted to the report: first, to any allowance whatever in the way of consideration paid by Mrs. Powell for the deed of settlement of the first of January 1839; and second, to the credit of seventeen hundred and five dollars, allowed in the second statement of the debt due to the college. And the defendants excepted, so far as the calculation of the wife's interest in real estate is founded upon Wigglesworth's tables.

The cause came on to be finally heard on the 26th of March 1853, when the court held, that the deed of January 1st, 1839, from Thomas J. Powell to Bosher, having been made when Powell was indebted to the

plaintiffs, was, as to them, null and void, except to the extent of the interests surrendered by Mrs. Powell in relinquishing her right of dower in the lands of her husband, and her right to her own land. And the court further held that the deed of the first of April 1841 from Thomas J. Powell and wife to George N. Powell was not fraudulent and void, inasmuch as the deed fully recognizes the plaintiff's debt, and increases the security for its payment, by making the whole land liable therefor. The court further held that the debt due to the plaintiffs from Thomas J. Powell, should be credited by the sum of seventeen hundred and five dollars, as of the 19th of October 1841, the date of the sale, when the land was bid in by Christian for the plaintiffs. And the court confirming the commissioner's report, so far as it was consistent with these views, and overruling all exceptions in conflict therewith, decreed that Herbert A. Claiborne, the commissioner who had sold the settled property, out of the funds in his hands, should pay to the plaintiffs the sum of four hundred and eighty-eight dollars and sixty-five cents, with legal interest on two hundred and ninety dollars, part thereof, from the 19th of October 1841, and their costs. From this decree the college applied to this court for an appeal, which was allowed.

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Daniel, for the appellants.
Griswold & Claiborne, for the appellees.

LEE, J. The settlement of Thomas J. Powell upon his wife of the 1st of January 1839, having been made when he was heavily indebted to the appellants, and as it would seem, insolvent, being of his whole estate except perhaps his interest in the King William land, which was already incumbered beyond its value by the deed of trust of 1836, and being upon a consid-

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ration not at all adequate in value to the property settled, must be held fraudulent and void as to creditors, except so far as it may be sustained for the purpose of rendering to the estate of Mrs. Powell a just equivalent for any interests which she may have surrendered on faith of it. We are therefore to enquire what were the interests, if any, so surrendered, and whether to the extent of those interests the settlement can be held good. And on making this enquiry we are at once met by the objection to the testimony of Thomas J. Powell.

Now it is a pervading principle of the law of evidence, that a husband or wife cannot be a witness in a cause, civil or criminal, in which the other is a party; not for that other, because the law considers them as one person, and their interests as identical; nor against that other, on grounds of public policy, because of the mutual confidence subsisting between them, and for fear of sowing distrust and dissensions and of giving occasion to perjury. Co. Litt. 6 b; Stark. Ev. part iv, p. 706; *Barker v. Dixon*, Cas. Temp. Hardwick 264; *Bentley v. Cooke*, 3 Doug. R. 422; *Robin v. King*, 2 Leigh 141, per Carr, J.; *Stein v. Borman*, 13 Peters' R. 209; *Fitch v. Hill*, 11 Mass. 286.

The rule prevails in equity as well as at law. *Sedwick v. Watkins*, 1 Ves. jr. R. 49; *Vowles v. Young*, 13 Ves. R. 140; *City Bank v. Bangs*, 4 Paige's R. 285. And if an estate be settled upon a wife for her sole and separate use, exempt from the debts or control of the husband, the legal identity of interests is regarded as still subsisting, and the husband will not be admitted to testify touching such separate estate, though there may be other parties in respect of whom he would be a competent witness. *Windham v. Chetwynd*, 1 Burr. R. 424; *Davis v. Dinwoody*, 4 T. R. 678; *Langley v. Fisher*, 5 Beav. R. 443; *Snyder v. Snyder*, 6 Binn. R. 483. So a husband is not a competent

witness to prove the execution of a deed conveying property for the benefit of his wife, for the purpose of registration. *Johnston v. Slater*, 11 Gratt. 321. Nor is it material that the relation of husband and wife no longer exists when the party is offered as a witness, for the incompetency still remains though the marriage have been dissolved by death or a divorce *a vinculo matrimonii*. *Areson v. Lord Kimaird*, 6 East's R. 188; *Coffin v. Jones*, 13 Pick. R. 441; *Stein v. Borman*, 13 Peters' R. 209; *Ratcliff v. Wales*, 1 Hill's R. 63; *McGuire v. Malony*, 1 B. Monr. R. 224.

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This case falls clearly within the rule ascertained by the cases cited. Thomas J. Powell is offered as a witness in support of the settlement made by him upon his wife. By his testimony it is sought to make out the consideration in favor of those now claiming under the wife. For this purpose he was clearly incompetent, nor was his competency restored (as we have seen) by the death of his wife. That he was not himself personally interested because he was bound for the college debt in any event, or that his interest was the same either way, does not vary the case. The authorities cited show that his incompetency does not rest upon the narrow ground of a personal and direct interest in himself but upon other and different principles. Indeed the incompetency has been maintained even in cases in which the husband's interest was the other way. Thus in an action by the trustee for a wife against the sheriff for taking goods which were her separate property, under an execution against the husband, the husband was held to be an incompetent witness for the plaintiff, (the wife being regarded as the real plaintiff,) although he had an interest on the other side, in having his debt satisfied by the levy of the execution. *Davis v. Dinwoody*, 4 T. R. 678; see also *Bland v. Ansley*, 5 Bos. & Pul. 331.

The cases of *Kevan v. Branch*, 1 Gratt. 274, and *Pat-*

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teson v. Ford, 2 Gratt. 18, (cited by the counsel,) do not touch the question here. They merely affirm the competency of the grantor as a witness for the grantees in an action by them as relators upon an indemnifying bond taken when the property was levied upon under an execution against the grantor, in favor of other creditors of the common debtor. They decide that the party's being such grantor does not of itself disqualify him as a witness; but do not reach the case where the grantee is the wife of the grantor, and the parties interested are claiming under her.

Rejecting then the testimony of Thomas J. Powell, there is no evidence supporting or explaining the item of six hundred dollars claimed as part of the consideration of the settlement. It is true it is recited in the deed that this was part of Mrs. Powell's private funds or "pin money" paid towards the purchase of the property settled. But the recitals in a post nuptial settlement as to the consideration, though admissible as against a person claiming under the settler, are not evidence against a creditor by whom the fairness and validity of the deed is assailed. Nor are declarations of the wife at the time of executing a deed, or at other times, that it was executed in consideration of a promise of the husband to make a settlement upon her, or because he had made such a settlement, sufficient evidence of a contract to support such a settlement, if made, even to the extent of a reasonable compensation for a right of dower relinquished by her. *Blow v. Maynard*, 2 Leigh 29; *Lewis v. Caperton*, 8 Gratt. 148. I think it clear therefore that the claim to this six hundred dollars as part of the interest to the extent of which the estate of Mrs. Powell can under any circumstances be indemnified, cannot be maintained. Indeed if we look at the testimony of Thomas J. Powell, it would appear that this six hundred dollars was in fact his money, though called Mrs. Powell's, and that

her alleged right was not such as under the circumstances surrounding the parties and the transaction at the time of executing the settlement, can sanction its withdrawal from the fund subject to the debts of Powell, and its appropriation to the benefit of his wife.

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But although the claim to this six hundred dollars must be abandoned, I am of opinion that the settlement of the 1st of January 1839 may and should be sustained to the extent of securing to the estate of Mrs. Powell a just and reasonable compensation for the interests in the real property belonging to her, which were surrendered by the deed of the 1st of April 1841. That a post nuptial settlement in favor of a wife, made in pursuance of a fair contract for valuable consideration, will be held good, is a doctrine supported by abundant authority: And although it may have been made under such circumstances that it must be pronounced fraudulent and void as to the creditors of the husband, yet if the wife have relinquished her interest in property on faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with; and this though the settlement may have been made subsequent to the relinquishment. 1 Eq. Cas. Ab. 19; *Ward v. Shallet*, 2 Ves. R. 16; Prec. in Chy. 113; *Cottle v. Fripp*, 2 Vern. R. 220; *Clerk v. Nettleship*, 2 Levinz R. 148; *Chapman v. Emery*, Cowp. R. 278; *Lady Arundell, v. Phipps*, 10 Ves. R. 139; *Jones v. Marsh*, Cas. Temp. Talbott 63; *Quarles v. Lacy*, 4 Munf. 251; *Blanton v. Taylor*, Gilm. 209; *Taylor v. Moore*, 2 Rand. 563; *Wickes v. Clarke*, 8 Paige's R. 161; Fonbl. Eq. B. 1, ch. iv, § 12 and n. In *Harrison v. Carroll*, 11 Leigh, 476, Judge Stanard says, "It is not questioned by me that the dower interest of the wife may constitute a valuable consideration that will support a post nuptial settlement, and that such settle-

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ment, made in consideration of the surrender of such dower interest, may be supported against the claims of creditors." And in *Blow v. Maynard*, 2 Leigh 29. Judge Carr says, that "if the parting with these contingent interests (such as a joiture, dower, &c.) by the wife will support such settlements, it follows *a fortiori*, that her parting with her own estate, or making a charge upon it for her husband's benefit, will support them."

It is no valid objection to the settlement that there was no previous agreement in writing between Powell and his wife, nor (the testimony of Thomas J. Powell being rejected) any competent proof of even a parol agreement between them before the settlement. The agreement here must be regarded as contemporaneous with the settlement itself. The settlement upon its face purports to be in consideration of her surrendering her interest in the King William land; and her conveyance of her estate in that land is made after the settlement was executed and admitted to record. The settlement was executed by Mrs. Powell and by Bosher the trustee, as well as by Thomas J. Powell. It is a very different case from that in which the relinquishment of the wife's interest has been first made, and a subsequent settlement sought to be set up. In the latter case distinct proof of a previous agreement may properly be called for. Here when the conveyance of the King William land was made, it will be fairly and legitimately intended that it was made in reference to and on faith of the previous settlement made upon the wife professedly in consideration of such conveyance. What need of any specific, independent proof to this point? *Res ipsa loquitur*. And it would be most unjust to disappoint the wife wholly of the settlement on faith of which she must be supposed to have made her relinquishment, and yet hold her to the latter as valid and obligatory. See *Anon.* Prec. in Chy. 101.

It would be a sufficient answer to the charge of fraud on the part of Powell and wife in executing the deed of settlement, to say, that if there were fraud and she participated in it, still it will not be imputed to her by reason of her coverture. *Blanton v. Taylor*, Gilm. 209; *Taylor v. Moore*, 2 Rand. 563, 580. But in truth there is no just room to attribute any fraudulent purpose on the part of Mrs. Powell or any complicity in, or knowledge of any such purpose (if such there was) on the part of Thomas J. Powell. The settlement was made avowedly in consideration of her agreeing to convey the whole of the King William land, and such conveyance would of course pass both her own maiden land and her dower right in that of her husband. She subsequently in good faith carries out the agreement by conveying the same to George N. Powell; and the deed recites that a part of the consideration on which it was made was the agreement of George Powell to pay the college debt.

The interest of Thomas Powell in the land was already bound for the debt by the deed of trust of the 20th of April 1836; and George Powell's agreement to pay it, and his acceptance of the deed for the land with that stipulation on its face, would undoubtedly create an implied equitable lien upon the part which had belonged to Mrs. Powell, which could not be defeated or impaired by the deed of trust executed on the 6th of April 1846. For that deed in fact refers to the deed from Thomas J. Powell and wife to George Powell, and describes the King William land (though stated to contain 309 acres) as the same land conveyed by that deed: And thus gives full notice of the charge for the college debt. So that in effect by the transaction the security of the college debt is increased and improved instead of being diminished or impaired. That the deed recites the payment of five hundred dollars to the grantors as part of the consideration

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will not affect the character of the transaction; for whether that were a nominal sum merely, or if a real sum, whether it had been paid or were yet to be paid, the right of the college will not be varied. The whole land remained bound for the whole college debt, for the payment of which George Powell was also bound personally, as security for Thomas Powell; and if the five hundred dollars was yet to be paid to Thomas Powell, he would of course be postponed to the college, and could only come in after its debt had been satisfied.

Nor is there any thing in the circumstance that the deed of settlement describes the King William land as the property of Mrs. Powell, to justify any serious imputation against the transaction. It is true, the whole of the tract was not her individual property, but a part of it, one hundred and fifty acres, and much the more valuable portion, being that on which the mansion-house stood, and which would seem to have been in a fine state of improvement, was her maiden land derived from her father; and it might very well happen that the whole might have been called her property by a mistake of the scrivener. Thomas J. Powell had already conveyed his interest in the whole by the deed of 1836, and Mrs. Powell's deed whenever properly made, would have precisely the same effect in passing her interest in the whole, whether described as wholly belonging to her, or partly to her and partly to Thomas J. Powell. It can scarcely be supposed that this erroneous description was made willfully and with a premeditated purpose of fraud by enhancing the supposed value of the subject which was to be relinquished in consideration of the settlement. The parties must have known that the facts were too readily ascertainable to render a resort to so flimsy an expedient at all safe or expedient; and I think, looking to all the circumstances, that it will be

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fairer to attribute the erroneous recital to carelessness or mistake rather than to any fraudulent contrivance or design.

To the extent therefore of a just compensation to the estate of Mrs. Powell for her maiden land surrendered by the subsequent conveyance, and for her contingent dower interest in the land of her husband, (to be estimated as of the date of the transaction,) I think the settlement of 1839 may and must be held good. And of this the creditors of Thomas Powell can have no just cause to complain. They are not injured because they get precisely what they would have been entitled to if there had been no settlement, and no relinquishment by Mrs. Powell of her own land, and of her interest in that of her husband. In the latter case her own estate and her dower right would have remained to her, and the just value of these and no more is what she is now to receive under the settlement.

Another and an important question relates to the credit of one thousand seven hundred and five dollars allowed by the decree upon the debt of Thomas and George Powell, as of the 19th of October 1841.

The claim to this credit is sought to be maintained upon two grounds: first, that the appellants should be treated as the purchasers of the King William land at the sale alleged to have been made by Christian in October 1841, and at which it is claimed the property was purchased for them by Christian, at the price of one thousand seven hundred and five dollars, to be applied as a credit upon their debt; secondly, that Thomas Powell should be regarded as a mere surety for the debt, and that Christian so conducted himself towards George Powell, the real principal as now supposed, as to discharge the surety from the debt either in the whole or at least to the extent of the one thousand seven hundred and five dollars.

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As to the first ground, the objection at once occurs that its effect is to enforce a contract for the sale and purchase of land without any note or memorandum in writing, signed by the party, or any agent for him, in direct contravention of the statute of frauds. It is not pretended that any conveyance was made or any written memorandum of the sale signed by any body. The whole matter rests in parol and upon the testimony of a single witness, that of Thomas J. Powell upon this point being of course inadmissible. Nor is there the slightest proof of any such part performance by delivery of possession or otherwise, as would induce the Court of chancery upon its principles, to take the case out of the operation of the statute. Nor could the wisdom and sound policy of the statute be perhaps better vindicated than in this case. The claim here must be sustained, if at all, upon the testimony of Edwards who speaks of a transaction, that took place upwards of eleven years previously, and of what was said by the different parties at the time. All the information he had at the time was evidently from his own showing, extremely meagre and imperfect, and the subject has been still further obscured by the mists of years since elapsed. The account which he gives is in some respects contradictory, in others, confused and unintelligible, and in all, unsatisfactory; and to receive such evidence to charge a party with the responsibilities of a contract would be fraught with all the mischiefs which it was the very design of the statute to remedy.

The other ground upon which it is sought to sustain this credit is equally untenable. There is nothing to support the pretension of Thomas Powell, that the relations in which he and his surety George Powell stood with respect to the college debt, were changed with the consent of Christian, and that George Powell became the principal debtor while he remained

bound as security merely. On the contrary, in the King William bill filed in 1847 and sworn to by Christian, he treats the debt as one in which Thomas Powell is principal and George Powell the surety, and he assails the deed of trust to Scott in 1846 as fraudulent, and claims that the land is then still liable, primarily, to the college debt. In the answer of George Powell, it is not pretended that Christian had assented to any arrangement changing the relations of the parties, or that any thing had been done to exonerate the land or discharge either Thomas Powell or himself from the debt or any part of it. Nor does he pretend that any such sale had ever taken place as that now alleged to found the claim to the credit of one thousand seven hundred and five dollars. On the contrary, he implicitly admits that the whole original debt is still owing by both the parties, and he expressly claims that the King William land is still primarily liable to the payment of the whole debt. All this is equally and utterly at war with the pretension now made of a purchase by Christian at a sale made by himself as trustee in 1841, on account of this debt, and with the notion, now brought forward for the first time, that Thomas Powell had been in some way exonerated from the debt. In truth, Christian seems to have done nothing except to give these parties the most liberal and continued indulgence; and if the land was suffered to go to waste while in the possession of George Powell, it was the fault of Thomas Powell and not of Christian. It was Thomas Powell who trusted George Powell: he conveyed the land to him absolutely and placed him in possession. If the property suffered whilst in his possession, Thomas Powell cannot complain; and if he were as he now alleges merely the security of George Powell, he had the right by a proper proceeding to have had the land sold at any time for his indemnity. *Stephenson v. Tavengers*, 9 Gratt.

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I am of opinion that the appellants may very well claim to charge the King William land primarily with the payment of their debt in preference to any of the other creditors secured by the deed of trust of the 6th of April 1846, without in any manner impairing their right to hold Thomas Powell personally responsible for any balance that may remain unsatisfied, and that nothing is shown in the cause to exonerate him or any property which would have been otherwise liable to the appellants' demand.

And while I am of opinion that this credit of one thousand seven hundred and five dollars must be rejected, I think it would be premature at this time to undertake to pronounce what credit should be given on account of the King William land. The land was sold, it seems, under a consent decree in the King William suit, and was purchased in on account of the college debt at the sum of seven hundred and two dollars. This sale appears to have been made on the 25th of January 1848, but it no where appears that it has ever been confirmed; and by the terms of the decree the proceeds were to await the event of the suit. So far as this record discloses, that suit is still pending, and *non constat* but that this sale may be disaffirmed and a new sale directed. Nor can we anticipate with certainty that the King William court will direct the application of the proceeds of the sale to the college debt, although we may think, judging from the record before us, that such application will be right and proper. But neither the trustee nor the creditors named in the deed of trust of 1846, are parties in this cause; and they are the parties to be prejudiced by this application of the proceeds of this land, and whose interest it is to contest it; and for obvious reasons it would be improper to direct that the college debt should be credited by the amount of these proceeds except by a decree which would be binding upon the

creditors named in that deed. The subject of this credit then should await the action of the King William court, unless the appellants shall sooner consent that it may be given.

The defense set up in the answer of Bosher, of a purchase by him of the shares of some of the heirs of Mrs. Powell, for valuable consideration without notice of any vice or defect in the settlement of 1839, does not appear to have been passed upon by the Circuit court, nor has it been adverted to in the argument here: and as in the view I take of the case, the cause must go back to the Circuit court, it is not necessary to express any opinion in regard to it at this time. It may be made the subject of proof if the parties shall be so advised, and of further consideration in the Circuit court.

I am of opinion to affirm so much of the decree as declares the deed of settlement of the 1st of January 1839 void as to the appellants, except to the extent of the just value of the interests surrendered by Mary E. Powell, in conveying her maiden land and relinquishing her right of dower in the lands of her husband; and also so much of the same as declares the deed from Thomas J. Powell and wife to George N. Powell of the 1st of April 1841, to be not fraudulent nor void; but in all other respects to reverse the same, with costs to the appellants; and to remand the cause to the Circuit court, with directions further to proceed in the same according to the principles herein before declared.

The other judges concurred in the opinion of LEE, J.

DECREE REVERSED.

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Mary
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Richmond.

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TAYLOR v. CULLINS.

(Absent ALLEN, P.)

May 18.

1. The principle of the case of *Maria v. Surbaugh*, 2 Rand. 228, recognized and enforced.
2. Testator gives all his estate to his two daughters for life, or until they marry; and directs that his slaves whom he names, shall be free on the happening of either event; and he gives them all the property which should then remain. One of the slaves has a child, and dies during the life of the daughters. The child is not freed by the will, but is embraced in the bequest to the slaves: And by the act of March 15th, 1832, Sup. Rev. Code 246, the bequest of the child to the emancipated slaves is void.*

John Cullins, late of the county of Powhatan, died in 1833, leaving a will which was duly admitted to probat. In the third clause of his will he says, "I give to my daughters Henley Cullins and Polly Cullins all my estate, both real and personal, provided they never marry. If my daughter Henley should die before my daughter Polly, it is my desire that Polly should have the whole of my property; or if my daughter Polly should die before my daughter Henley, it is my desire that my daughter Henley shall have the whole of the property. And it is my desire, that at the death of my daughters Henley and Polly, that the following slaves shall be set free: Nancy, Jane, Sally, Judith and America. And whatever property there may be left at the death of my daughters Hen-

*The act says, "No free negro or mulatto shall hereafter be capable of purchasing or otherwise acquiring permanent ownership, except by descent, to any slave, other than his or her husband, wife or children; and all contracts for any such purchase are hereby declared to be null and void."

ley and Polly, it is my wish and desire that it may be equally divided between the above named slaves."

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The testator then provides that if one of his said daughters marries, the other shall have the property; and if both marry, that the said slaves shall be set free: And he gives them the property upon this event as upon the death of the daughters.

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Neither of the daughters married, and Henley survived Polly.

In 1846 Henley Cullins, in consideration of a debt which she owed to Creed Taylor, and that he would pay all other debts which she owed, and would furnish her a home, and support her comfortably for her life, conveyed to him all her property. Taylor states in his answer that this contract had been made some time previous to 1846, when the deed was executed.

In the lifetime of Henley Cullins, Nancy, one of the slaves mentioned in the will of John Cullins, died, leaving a child named Martha: and all of the slaves seem to have gone into the possession of Taylor.

In 1850 the surviving slaves mentioned in the will of John Cullins, filed a bill in the Circuit court of Powhatan against Taylor and John C. Stratton, administrator *de bonis non* with the will annexed of John Cullins deceased, setting out the will, the death of Henley Cullins, and of Nancy, and that Martha was in the possession of Taylor who was about to sell her; and claiming that she was a part of John Cullins' estate which was bequeathed to them; and asking for an injunction to restrain the sale, and that she and the other property of John Cullins, after payment of his debts, might be delivered to them.

Taylor answered, insisting upon his title to the slave under the conveyance from Henley Cullins, and that the administrator of John Cullins had assented to the bequest.

Stratton answered, denying that he had assented to

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the bequest in favor of the daughters of John Cullins; and saying that the estate of John Cullins was indebted to him in the sum of forty dollars, and owed another small debt.

When the cause came on to be heard, the court held, that Henley and Polly Cullins took but a life estate in the slaves and other property of John Cullins, except such as was consumed in the use: That the slaves emancipated by the will were free on the death of Henley Cullins, but that their children born after John Cullins' death and during the lifetime of Henley Cullins, were slaves, and a part of John Cullins' estate; which by the terms of the will were given in remainder to the emancipated slaves. And Taylor was decreed to deliver Martha and any other of the children of the emancipated slaves born since the death of John Cullins, and before the death of Henley Cullins, to Stratton the administrator, who was directed to hold them subject to the future order of the court. From this decree Taylor applied to this court for an appeal, which was allowed.

Patton, for the appellant, insisted:

1st. That the slave Martha was not emancipated by the will of John Cullins. That the slaves emancipated were named, and there was not a word indicating an intention that the children born during the life estate should be free. That the case of *Maria v. Surbaugh*, 2 Rand. 228, had been repeatedly recognized and reaffirmed by this court. And the distinction between this case and the cases which would be relied on, on the other side, is, that in these last cases there was some expression in the will which included the slaves born during the existence of the particular estate in the gift of freedom.

2d. That the whole estate except the slaves emancipated, having been given absolutely to the daugh-

ters, and the increase of the slaves born during the lives of the daughters being included in that gift, the contingent limitation in favor of the emancipated slaves, being only of such property as should be left at the death of the surviving daughter, such limitation was repugnant to the estate given to the daughters, and void for uncertainty. And he cited *Riddick v. Cohoon*, 4 Rand. 547; *Lightfoot v. Gill*, 1 Bro. Par. Cas. 250; *Curtis v. Rippon*, 5 Madd. R. 434; *Kidney v. Cousmaker*, 1 Ves. jr. R. 436, 445; *Shermer v. Shermer's ex'ors*, 1 Wash. 266; *Goodwin v. Taylor*, 4 Call 305; *Burwell's ex'ors v. Anderson*, 3 Leigh 348; *Melson v. Cooper*, 4 Leigh 408; *Ross v. Ross*, 1 Jac. & Walk. 154; *Cuthbert v. Purrier*, 4 Cond. Eng. Ch. R. 191.

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3d. That the plaintiffs were free negroes claiming under a will made in 1833; and were forbidden to hold slaves, except a wife, or husband or child. Supp. Rev. Code 246.

Rhodes and Macfarland, for the appellees, endeavored to distinguish this case from that of *Maria v. Surbaugh*. In that case nothing was given by the will to the slave but her freedom; here they are made the legatees of the whole property after the termination of the life estate. They cited *Lucy v. Cheminant*, 2 Gratt. 36; *Elder v. Elder*, 4 Leigh, 252; *Anderson v. Anderson*, 11 Leigh 616.

They insisted further that under the act of assembly a free negro was entitled to hold as a slave his child, and that here Nancy the mother of Martha was one of the legatees, and she having died after the death of the testator, hers was a vested interest, and therefore passed to her administrator. They insisted further that the act did not intend to forbid a bequest to free negroes.

DANIEL, J. It appears that the negro girl Maria,

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the subject of this suit, was born after the death of the testator, and in the lifetime of Henley Cullins: And by the terms of the will the bequest of freedom to the slaves, Nancy, Jane, Ann, Sally, Judith and America was to take effect only at the death or marriage of both of the testator's daughters Henley and Polly, of whom Henley was the survivor.

Such a bequest, according to the decisions of this court, confers no right of present freedom on the legatee. On the contrary, the well established doctrine is, that where a person by deed or will declares his slave to be free at any particular age, or on the termination of a particular estate, or after a given period of servitude, or on the event of any contingency, the condition or *status* of the slave remains unaltered until such age is attained, or estate is terminated, or period of servitude has expired, or event has happened: And that any child born during such temporary servitude of the mother, follows the condition of the latter at the time of its birth, and is a slave. *Maria v. Surbaugh*, 2 Rand. 228; *Crawford v. Moses*, 10 Leigh 277; *Henry v. Bradford*, 1 Rob. R. 53; *Ellis v. Jenny*, 2 Rob. R. 597.

The cases of *Elder v. Elder*, 4 Leigh 252, *Erskine v. Henry*, 9 Leigh 188, and *Lucy v. Cheminant's adm'r*, 2 Gratt. 36, are not at all in conflict with these decisions. In each of these last mentioned cases the children born before their mother's right to freedom accrued, were adjudged to be free, not because of the prospective gift or bequest of freedom to the mothers, but because of some clause, in the deed or will, construed by the court, as extending the gift or bequest of freedom to the children themselves. In other words, the children derived their title to freedom not by descent but by purchase, as donees or legatees under the same instrument which gave freedom to their mothers.

Martha having been born during the servitude of

her mother Nancy, was consequently born a slave. And there being no clause in the will which, by any fair construction, can be taken as intending a bequest of freedom to her, she remains a slave. And as all the property remaining at the death or marriage of the survivor of the two daughters of the testator, is given over to the freedwomen, it would have been necessary, in order to determine the title to Martha, to enquire into the nature and extent of the estate given to the two daughters, and the validity of the title which the appellant Taylor asserts under the deed from Henley Cullins of the 26th June 1846, were it not for the provisions of the act of assembly of the 15th March 1832. But by the third section of this act, (see Sessions Acts 1831-2, page 21,) it is declared that no free negro or mulatto shall thereafter be capable of purchasing or otherwise acquiring permanent ownership, except by descent, to any slave, other than his or her husband, wife or children; and all contracts for any such purchase are thereby declared to be null and void.

Nancy, the mother of Martha, was the only one of the legatees in remainder who (upon the supposition that the bequest was in other respects good) could, under the exception in the statute, have acquired any title to Martha by virtue of said bequest. As she died in the lifetime of Henley Cullins, it is obvious that the other freedwomen have no legal concern about or interest in the title to Martha. None, as legatees in remainder, because of the provisions of the statute, and none by descent as next of kin to Nancy, inasmuch as she died before any right to freedom or property under the will accrued.

It seems to me, therefore, that there is manifest error in so much of the decree of the 12th of July 1853, as decrees Taylor to deliver to Stratton, administrator *de bonis non* with the will annexed of John Cullins, the slave Martha, and any other of the chil-

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dren of the emancipated slaves born since the death of said John Cullins and before the death of Henley Cullins, which he may now hold: And that instead of so much of said decree, the Circuit court ought to have rendered a decree dissolving the injunction, and dismissing the bill as to Taylor, with costs to Taylor.

No one but Taylor has appealed; and it is therefore unnecessary to express any opinion as to the other portions of the decree, with which he has no concern.

The other judges concurred in the opinion of
DANIEL, J.

The decree was in conformity with the opinion.

Richmond.

PURYEAR v. TAYLOR.

(Absent ALLEN, P.)

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May 18.

1. A *fieri facias* is a lien from the time it goes into the hands of the officer to be executed, upon all the personal estate of the debtor, including debts due to him, with the exception stated in the statute; and this lien continues after the return day of the execution; and only ceases when the right to levy the execution, or to levy a new execution upon the judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process. See Code, ch. 188, § 3 and 4, p. 717.*
2. The lien of a *fieri facias* of prior date, has priority over an attachment of subsequent date.

On the 25th of October 1851, William N. M. Taylor instituted an action of debt in the Circuit court of Mecklenburg county against Richard H. Daly for four hundred and two dollars and four cents, with legal interest thereon from the 27th of March 1849. The

* Code, ch. 188, § 3. "Every writ of *fieri facias* hereafter issued shall, in addition to the effect which it has under ch. 187, be a lien from the time that it is delivered to the sheriff or other officer, to be executed, upon all the personal estate of or to which the judgment debtor is possessed or entitled, (although not levied on, nor capable of being levied on under that chapter,) except in the case of a husband or parent, such things as are exempt from distress or levy by the thirty-fourth section of chapter 49, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time that he has notice thereof. This section shall not impair a lien acquired by an execution creditor under ch. 187."

§ 4. "The lien acquired under the preceding section shall cease whenever the right of the judgment creditor to levy the *fieri facias* under which the said lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process."

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On the same day, an affidavit having been made as prescribed by the statute, Code, ch. 151, § 1, p. 600, an attachment was issued to attach the effects of the defendant to the amount of the debt; and it was served on J. J. Daly on the 27th of the same month.

On the 15th September 1852, judgment was recovered against the defendant for the amount of the debt; and on the motion of the plaintiff, it was ordered that J. J. Daly, the garnishee in the attachment, be summoned to appear at the next term of the court, to say on oath whether he owed debts to, or had effects in his hands belonging to, the defendant. This summons was issued on the 10th of January 1853, and was served on the 8th of February following.

At the March term of the court J. J. Daly appeared and made a return to the summons, by which it did not appear that there was any certain sum in his hands belonging to Richard H. Daly, though it was stated that he had an interest in two estates of which J. J. Daly was the administrator.

At the September term the garnishee was permitted to amend his return, and he then stated that the interest of Richard H. Daly in the two estates of which the garnishee was administrator, amounted to seven hundred and ninety-four dollars and seventy-eight cents, on the day of his return; which amount he stated was not sufficient to pay the indebtedness of Richard H. Daly to the plaintiff, and to Richard C. Puryear, surviving partner of A. B. Puryear & Co. who had a summons pending in the same court against J. J. Daly as garnishee of Richard H. Daly. And he asked the court to decide which of the creditors had the preference, so as to protect him.

At the same term of the court Richard C. Puryear filed his petition in the case, setting out his proceed-

ings against Richard H. Daly, and the garnishee, and claiming the fund in the hands of the latter. It appears that Puryear recovered a judgment against Richard H. Daly in May 1844, for one thousand and ninety-six dollars and seven cents, with interest from the 1st of January 1842. Upon this judgment an execution was issued in the same month, and returned, "no effects." That afterwards, on the 9th of December 1850, he sued out another execution on his judgment; which was also returned "no effects." And on the 10th of March 1853 he sued out another execution, upon which there was the same return.

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On the 11th of March 1853, Puryear having made a suggestion in pursuance of the act, Code, ch. 188, §10, p. 718, that by reason of the lien of his *fieri facias* issued on the 9th day of December 1850, there was a liability on J. J. Daly who had money and effects in his hands belonging to Richard H. Daly, a summons was issued to J. J. Daly to appear at the next September term of the Circuit court of Mecklenburg, then and there to declare on oath whether he had any money or effects in his hands belonging to the said Richard H. Daly, and what amount. This summons was served on the same day: And at the September term J. J. Daly made a return similar to that made by him in the case of Taylor.

At the same term of the court the case came on to be tried, and the parties dispensing with a jury, the court held that as no suggestion had been made of a lien under the execution which issued in favor of Richard C. Puryear against Richard H. Daly on the 9th of December 1850, until the 11th March 1853, after the return day thereof, the said Richard C. Puryear had no lien on the funds in the hands of J. J. Daly by virtue of that execution. But that he acquired a lien by virtue of his execution which issued on the 10th of March 1853, which lien was subsequent

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to that of Taylor. It was therefore ordered that Taylor's debt, admitted to be five hundred and twenty-four dollars and eighty-two cents, should be paid out of the funds in the hands of J. J. Daly; and that the balance of that fund, amounting to two hundred and sixty-nine dollars and ninety-six cents, should be paid to Puryear, in part satisfaction of his judgment. From this judgment Puryear applied to this court for a *supersedeas*, which was allowed.

Patton, for the appellant.

The single question in this case is, whether the attachment of Taylor or the suggestion of Puryear is entitled to preference; the *fieri facias* having been issued and returned before the attachment was served. Both of the laws under which these parties proceeded are new in Virginia.

By the act, Code, ch. 188, § 2, p. 716, the execution against the body of the debtor was abolished; and this chapter was intended to give the creditor all that the issue of a *capias ad satisficiendum*, the arrest of the debtor and his discharge under the insolvent laws, would afford him, with one exception, which is not in favor of the attaching creditor. The third section gives the execution creditor a lien on all the property of the debtor, though the execution could not be levied upon it; with the special exceptions stated in the section. The fourth section shows when the lien is to cease. That is when the right to levy an execution ceases, or is suspended by a forthcoming bond being given and forfeited, or by *supersedeas* or other legal process.

The act provides that it shall not impair a lien acquired by an execution creditor under chapter 187: Thereby showing that it is preferable to an attachment lien, and of all execution liens except when levied under ch. 187, § 11. Then the effect of an

execution returned "no effects," under chapter 188, is to give a lien on all the property of the debtor. But if another execution is afterwards issued and levied upon property of the common debtor, which is subject to levy, that is good against the first lien; and the exception in this case proves the rule. When it is intended to protect creditors, the act so provides.

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But it is said that the proceeding provided by ch. 188 must be taken before the execution expires. If this be so, it is not what was intended, and is in fact nonsense and useless. There is no doubt the *fieri facias* is at an end as to all property on which the execution may be, and is not, levied under ch. 187. The sheriff gets his authority from the precept, and when that expires his authority expires. But the act, ch. 188, was intended to continue the lien, and it is wholly useless unless it has this effect; for ch. 187 had not only given the lien but the right to levy. That act, § 11, says the execution shall bind as to creditors and purchasers for value without notice only from the time it is delivered to the sheriff. It must then bind from that time. The act, ch. 188, § 3, says, in addition to the effect the execution has under ch. 187, it shall be a lien on all the property of the debtor, whether levied on or not, or whether or not it can be levied on, except as to a purchaser, assignee or other execution creditor. And by § 17 of this chapter, the creditor may avail himself of the remedies provided by it; and yet without impairing his lien under it, may from time to time, under ch. 186 and ch. 187, issue other executions upon his judgment until the same be satisfied. If he has no lien after the return day of the execution, why provide that it shall not be impaired by the issue from time to time of other executions upon his judgment? And I would ask too how a creditor can know whether or not an execution will be levied until it is returned; and therefore how

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he can proceed to subject his debtor's property, as provided in ch. 188, before his execution expires?

There is certainly no reason in justice or sound policy, why the lien of an attachment should be preferred to the lien of an execution: The attaching creditor is not an assignee for value: There are good reasons why such an assignee without notice should be protected; and the act protects him. And indeed the act expressly protects all those who have any right to protection: The attaching creditor has none.

Rhodes and Macfarland, for the appellee.

We do not concur in that construction of the statute by which it would give to an execution the effect of a continuing, indefinite lien. It is true that the act extends the range of the lien. Subjects not before liable are now subjected to it. But it is not pretended that there is any change in the lien as to the subjects before embraced in it; and therefore unless a creditor has two distinct liens, it must be limited throughout as it was under the former law.

The counsel for the appellant relies upon the third section of ch. 188 of the Code. But that section must be construed with reference to the 11th section of ch. 187. This last section extended the operation of the execution to current money and bank notes. The 3d section of ch. 188 provides that the execution shall bind all property, though it is not levied on or capable of being levied on, except as therein stated. It does not say what shall be the attributes of the lien; and we are left to look to the common law to ascertain what is intended by it. But at common law the lien of a *fieri facias* only existed whilst the execution was in existence; and when the return day of the execution was passed, the lien was gone. It is therefore wholly opposed to the idea of a continuing, indefinite lien created by an execution which has long since ex-

pired. See Bac. Abr. Execution, letter D; *Payne v. Drew*, 4 East 523.

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SAMUELS, J. The statutes of Virginia in force prior to the 1st of July 1850, afforded to a judgment creditor the means of obtaining satisfaction of his claim out of the estate, real, personal or mixed, of the judgment debtor. On and after the day named, when the Code of Virginia went into operation, whilst the creditor retained his right to satisfaction, the process by which he was to attain it was greatly changed by the Code. It is only necessary in this case to advert to the rights and remedies of the creditor in regard to debts due from other persons to the judgment debtor, inasmuch as the subject in controversy here is a debt due from J. J. Daly to Richard H. Daly, the judgment debtor. Under the law as it stood before July 1, 1850, a subject of this nature was reached by causing the debtor to be arrested under a writ of *capias ad satisfaciendum*, and committed to jail, there to remain until discharged under the insolvent laws. Before such debtor could be so discharged, he was required to surrender every thing of value (with a few specified exceptions) owned by him, including debts due to him, to be applied in a designated mode to the satisfaction of the creditor's demand. If the debtor failed to surrender his estate as the law required, still, by mere operation of law he was divested of all title thereto, and the estate applied, in a way pointed out, to discharge the debt. Section 2, ch. 188, abolishes the writ of *ca. sa.* in all cases except those provided for in § 1, of which the claim before us is not one.

It was obviously the purpose of the general assembly to save to the creditor the rights which he might have acquired if the former laws had continued to exist, and to give him a new and adequate remedy to enforce his rights. The revisors in their report to the

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general assembly, p. 926, say, that "This chapter (188) is framed to provide for the creditor (in place of taking the debtor under a *capias ad satisfaciendum*, and compelling him to take the oath of insolvency) as efficient remedies (in cases not provided for by the 1st and 2d sections) against all estate not subjected to other process, as he now has when the debtor is discharged by taking the oath of insolvency." The revisors accordingly reported a section of the statute giving the creditor the remedy indicated by them; and the general assembly in substance adopted the suggestion, which is found embodied in § 3, ch. 188. This section gives to the *fi. fa.* a capacity to bind mere *choses in action*, by making it a lien thereon, with some exceptions, not material in this case. Section 4 prolongs the lien beyond the return day of the *fi. fa.*; it is directed to cease "whenever the right of the judgment creditor to levy the *fi. fa.* under which the lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by *superseideas* or other legal process." Section 17 provides for repeated executions, without impairing the lien attaching under the first execution.

It clearly appears in the section last cited, that the legislature intended the lien to continue after the return day of the *fi. fa.*; otherwise, it would have been useless to provide for preserving a lien if the lien should be regarded as already lost. Looking as well to the intention as to the plain words of the statute, I am of opinion that the lien of Puryear's *fi. fa.* was in full force when he filed his suggestions under section 10, to make it productive. This lien commenced December 10th, 1850, the day on which the *fi. fa.* was delivered to the sheriff.

The suit brought by Taylor against Richard H. Daly was brought 25th of October 1851; and on the same day he sued out an attachment under the statute, Code

of Virginia, ch. 151, § 1. This attachment was served on J. J. Daly as garnishee October 27, 1851. Thus the liens of Puryear's *fi. fa.* and Taylor's attachment are brought in conflict. These liens are both given by statute, and are merely legal. It is perfectly obvious that Puryear's lien, being first in point of time, must take precedence of Taylor's. See *Erskine v. Staley*, 12 Leigh 406.

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I am of opinion to reverse the judgment in favor of Taylor, and to render judgment in favor of Puryear.

The other judges concurred in the opinion of SAMUELS, J.

JUDGMENT REVERSED.

Richmond.

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PEERS *v.* BARNETT *& others.*

May 21:

1. Land is purchased by the acre; but after the survey is commenced the vendee agrees to take it at the quantity for which the vendors held it, and the survey is stopped. He is concluded by his agreement, and is not entitled to an abatement from the purchase money on account of a deficiency in the quantity.
2. A court of equity will not decree a sale of land for the payment of the purchase money, whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale.
3. Land is sold and conveyed in 1828, and a bond is given by the vendors with condition to perfect the title. In 1834 a bill is filed by the vendors to subject the land to sale for payment of the purchase money. The vendee answers, and objects that the title has not been perfected. The cause lingers on the docket, partly by the fault of the vendee, until 1852. Although at the filing of the bill the defects in the title would have forbidden the sale of the land, yet the lapse of time and the uninterrupted possession of the vendee under the deed, the absence of any suggestion of disturbance, or the assertion of any adverse claim up to the time of the hearing, quieted the vendee's title, and cured the defects therein: And a decree for the sale was therefore proper.
4. In such case, as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs.
5. The vendee claims a credit for payment upon and set-off against the purchase money; and a commissioner is directed to state an account of them; but he contumaciously refuses to present his vouchers and evidence before the commissioner; but when the report is returned, filed exceptions to it. Though it is probable he may be entitled to some credits not allowed him, yet having refused to submit them to the commissioner, where they might have been properly investigated, they will not be allowed.

Some time previous to 1809 William Barnett died, leaving a widow and eight children, and possessed of a tract of land in the county of Goochland containing, according to an old survey, two hundred and fifty-seven

acres. The widow seems to have had a life estate in the land, and to have died previous to the year 1828. One son, George C. Barnett, seems to have died after his father, intestate and unmarried; and his brothers and sisters were his heirs. On the 4th day of January 1828, Robert F. Barnett, George Southworth and Elizabeth his wife, Cisley Pollack, in her own right and in right of Mayer Pollack, as far as she had title, Nancy Nuckols, by her agent William Nuckols, Turner R. Henley and Hanna his wife, and Nelson Martin and Eliza A. his wife, describing themselves as legatees of William Barnett deceased, in consideration of nine hundred and seventy-six dollars and sixty-six cents, conveyed this tract of land to Alexander M. Peers with general warranty. At the same time they executed a bond to Peers in the penalty of one thousand dollars, with a condition to make to Peers a complete title to the interest of Elisha Barnett and others in said land. The purchase money was payable in four equal annual installments, for which Peers executed his bonds; and to secure the same executed a deed of trust on the land and also an adjoining tract which he owned.

In August 1834 the parties who had sold the land to Peers instituted a suit in equity in the Circuit court of Goochland county, and in their bill they stated the sale and conveyance to Peers, and his execution of the bonds and deed of trust. They alleged that Peers had failed to pay the purchase money, and that the trustees had refused to execute the trust. And making them and Peers parties defendants, the plaintiffs asked that the trustees might be compelled to execute the trust, and out of the proceeds to pay what was due upon the bonds; or if they refused to execute the trust, that a commissioner might be appointed to do it, and for general relief.

Peers answered the bill. He stated that he pur-

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chased the land at three dollars and eighty cents per acre; and that upon a survey of the land it fell short of the quantity at which it was estimated some twenty acres. That after his purchase the vendors were about to have the land surveyed, but as they were anxious to get home, and from assurances made to him that the land would fully hold out, if not overrun, and as they wished to place him as nearly as practicable in their shoes touching a disputed line, he did agree to take the land by the old survey. And this he was still willing to do if the parties would make good to him the boundaries called for by the old title papers relating to the land; or if an allowance was made to him for the deficiency in the quantity sold to him.

He stated further, that the title was defective as to the interests of Elisha Barnett, Mrs. Turner H. Henley, Mrs. Robert F. Barnett (who did not execute the deed) and George C. Barnett; and he insisted that he should not be required to pay more of the purchase money than he had already paid. That Elisha Barnett had never conveyed to him any title, nor could he do it, having sold his interest in the land, of which the defendant was ignorant at the time of his purchase. That Mrs. Henley's title could not be made good to him, as he had been informed that she and her husband had conveyed her interest in the estate previous to the defendant's purchase. That Mrs. Robert F. Barnett had never conveyed her title: Nor had the interest of George C. Barnett been conveyed to him; but as he had been informed, said Barnett had conveyed it away.

He further insisted, that if his accounts were allowed him, independent of the title bond which he exhibited, he had not retained enough of the purchase money to indemnify him against the defects of the title: And he exhibited with his answer an account of his payments and offsets to the purchase money. Among the items in this account was one of seventy

cents "paid for recording William Nuckols' power of attorney for Nancy Nuckols."

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The deposition of Elisha Barnett was taken, and he stated that he sold his interest in the land to Mayer Pollack in 1807. Several witnesses proved that upon the purchase of the land by Peers, the parties commenced to survey it, and ran some of the lines, when Peers told them they might stop the survey, and he would take the land at what they held it, or by the old survey. The two chain carriers did not remember which of these expressions he used; two other witnesses said he used the first expression. It appeared that the first bond was discharged, but there was some dispute whether this was done by the application of certain credits to which he was entitled, or otherwise.

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In October 1835, the cause came on to be heard, when the court directed a commissioner to take an account of all the payments which had been made by the defendant Alexander M. Peers towards the discharge of his bonds given for the purchase money of the land, and make report to the court: And upon the application of Peers, leave was granted him to have a survey of the land at his own costs, upon giving the plaintiffs reasonable notice of the time of making the survey.

The commissioner having reported that Peers had failed and refused to attend and submit his vouchers to the commissioner, so as to enable him to execute the order made in the cause, a rule for an attachment was made upon Peers, returnable to the next term. But the rule was to be discharged if he should in the mean time, when notified by the commissioner, appear before him with his accounts and vouchers. And similar rules were made upon Peers in April 1838 and October 1839, without effect.

In April 1842, the death of the plaintiff George Southworth was suggested, and William Southworth,

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his administrator, made himself a party plaintiff. In January 1843, the court made an order for an account similar to that made in October 1836. And in July 1843 the commissioner returned his report. He presented three statements of the account. In all of them the first bond was considered as paid off, and a credit of one hundred and twenty dollars endorsed on the second bond was allowed. These were the only credits allowed in the first statement; and that statement the commissioner considered the correct one. The second statement allowed a credit of seventy-eight dollars, for cattle which Peers alleged he had let Southworth have; and in the third statement he allowed the further credit of forty dollars and sixty-nine cents on each of the three bonds on account of Henley's interest in the land. These credits Peers had claimed in the account filed with his answer, but of which he furnished no proof to the commissioner; nor indeed did he appear before the commissioner, but the statements were made at the instance of Southworth's administrator, who stated that he knew nothing about the credits, and required proof of them.

After the return of the report Peers filed fourteen exceptions to it. And he filed evidence to sustain his exceptions. The third exception was for the failure to allow him a credit for a deficiency of fifty-three acres in the quantity of land. And he filed the report of the surveyor made under the order in the cause; from which it appeared that this quantity of land embraced within the bounds of the survey, was included in the tracts of the adjoining proprietors, and was in their possession. The fifth exception related to Henley's interest in the land, which Peers alleged he had purchased, and which the evidence filed sustained. The tenth and eleventh exceptions were for the application of credits to which he was entitled, to the satisfaction of the first bond, which he insisted had been dis-

charged otherwise. The thirteenth and fourteenth exceptions were for defects in the title. The evidence on this subject is stated by Judge ALLEN in his opinion.

On the 28th of September 1852, the cause came on to be heard, when the court sustained the fifth exception, and overruled the others; and a statement having been made correcting the first statement of the commissioner in that respect, showing that there was due on the said bonds on the 7th day of March 1843, the sum of eight hundred and thirty-three dollars and twenty-three cents, of which four hundred and eighty-five dollars and seventy-two cents was principal, it was decreed that unless the defendant Peers should pay that sum, with interest on the principal, within six months from the decree, the trustees in the deed, who were appointed commissioners for the purpose, should proceed to sell the land embraced in the deed, in the mode and upon the terms prescribed in the decree, and make report to the court. And the rights of Peers under the title bond executed to him by the parties were reserved to him. From this decree Peers applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.

Day, for the appellees.

ALLEN, P. delivered the opinion of the court:

A distinction seems to have been taken by some of the reported cases, as to the relief a court of equity will extend to a vendee who has accepted his deed with covenants of general warranty, where he seeks to enjoin a judgment for or the collection of the purchase money, and the case where the vendor, instead of proceeding against the vendee personally, is attempting to sell the land under a deed of trust or by a bill in equity; that although the facts may not

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authorize the court to enjoin the collection of the purchase money by a proceeding against the vendee at law, yet, as a court of equity reprobates a sale of land when clouds are hanging over the title, it will for the benefit of the parties, and the security of the purchaser at any sale of the subject, enjoin or refuse to decree a sale of the land until the title is cleared up. The case of *Beall v. Liveley*, 8 Leigh 658, is a case of the first class. It was there decided that where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase money, unless he can show a defect of title respecting which the vendor was guilty of fraudulent concealment or misrepresentation, and which the vendee had at the time no means of discovering. In *Ralston v. Miller*, 3 Rand. 44; *Koger v. Kane*, 5 Leigh 606; *Clarke v. Hardgrove*, 7 Gratt. 399, this court has extended the relief to cases where the vendee, placing himself in the position of the superior claimant, can show clearly that the title is defective.

The principle that a court will not sell or permit a sale of land with a cloud hanging over the title, is affirmed in *Lane v. Tidball*, Gilm. 130; *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle*, 5 Leigh, 460.

In the present case, which was a bill filed to subject the land to sale for payment of the purchase money, in consequence of the refusal of the trustees to sell, the appellant resisted the sale, first, upon the ground of a deficiency in the quantity; and secondly, because the complainants had failed to make a clear title to the land sold and conveyed by them.

The first ground is not assigned as error in the petition, and is clearly untenable. The vendors offered to survey the land. A survey was in part actually

made in the presence of all the parties, when the appellant stopped the survey, declaring himself willing to take the land at what they held it, be it more or less. The contract was then consummated; the deed, and a deed of trust to secure the purchase money were executed, both bearing date on the 4th of January 1828.

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That this was after the partial survey, is shown by the testimony of Robert Sneed, from which it appears that at the time of the purchase, William Sanders was to become surety for the purchase money, and who it seems had an interest in the purchase; that when they met to survey, Sanders refused to become surety, and the appellant agreed to give a deed of trust on his own land and the land purchased, on Sanders' consenting to relinquish his interest in the purchase; and thereupon they commenced to survey as aforesaid. Whatever right the appellant may have had to the survey under the first purchase, he then waived it.

As to the title, the appellant did not agree to rest upon the covenants of his deed alone. The parties contracted with a full knowledge of the facts in regard thereto; and on the same day the deed and deed of trust were executed, the appellant took from the appellees, his vendors, a bond in the penalty of one thousand dollars, with a condition which recited they had sold to the appellant the land formerly belonging to William Barnett deceased, in which land Elisha Barnett's interest was not conveyed; and binding the parties to make a complete title to said Elisha Barnett's and others' interest.

Under this obligation the appellant could have sued, if the obligors failed to make a title in a reasonable time: He was not bound to wait until evicted. The vendors, in executing a deed with covenants of warranty, had not fully acquitted themselves of all obligation to active effort to get a clear title for the vendee. The burden of proof did not devolve on him to show

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an eviction or a suit threatened or prosecuted, or that the title was clearly defective. The defect of title was admitted, and it was the duty of the appellees to have cured it, before they instituted their suit or called on the trustees to sell. The conveyance was executed, and the appellant gave his notes for the purchase money on the 4th of January 1828, the last installment falling due on the 1st of January 1832; and the suit was brought on the 21st of August 1834. At that time the appellees were the defaulting parties, as they claimed the whole purchase money and asked for a sale of the whole tract, notwithstanding their failure to make a clear title to Elisha's share. The appellant was well warranted in resisting such sale until the title was made. He however did not ask for a rescission, but objected to paying for the land until his title was perfected according to the terms of the deed from the complainants to him. In this state of the case, if the appellees had procured the proper deeds and releases at any time before final decree, they would then have been entitled to a decree for their purchase money and for a sale of the land to pay it; for then the principle settled in the case referred to would not have applied; the court would not have been decreeing a sale of land with a cloud hanging over the title. But time and possession may effect the same thing that an actual release or conveyance would have done. The conveyance was executed, and as it would seem, possession taken under it as early as 1828. Owing to the delays in the progress of the suit, caused in part apparently, by the claims to credits asserted by the appellant, and his contumacy in resisting the orders of the court to produce his vouchers before the commissioner, no decree for a sale was rendered until the 28th of September 1852, upwards of 24 years after the sale and conveyance. Our statute, Code, ch. 149, § 1, p. 590, limits the right of entry to fifteen years after

the right to make such entry shall have accrued; and furthermore allows ten years within which persons laboring under disabilities may enter or sue, next after the time such person shall have ceased to be under disability.

The appellant did not suggest in his answer that he had been disturbed in the enjoyment of the property. No suggestion of any disturbance was made before the interlocutory decree. And after such a lapse of time, it is not reasonable to suppose that there could be any danger of such disturbance.

It seems there were nine heirs or devisees to whom the land descended or was devised. The answer alleges that Elisha Barnett's share has never been conveyed. Elisha Barnett is examined as a witness, and deposes that he had conveyed his right, title and interest in the land belonging to his father, to Mayer Pollack; and a deed from him to Mayer Pollack for his ninth part of said land, dated and recorded in 1809, is filed as an exhibit. Cisley Pollack, who was one of the heirs or devisees, united in the deed to the appellant, conveying in her own right, and in right of Mayer Pollack deceased, as far as she had title. Under this conveyance the appellant entered; and no person claiming under Mayer Pollack appears to have asserted any adverse claim; and unless they labored under disability, which is not alleged, the presumption is that Mrs. Pollack had title, as she undertook to convey something; or that those entitled have acquiesced in her act. Another of the heirs, George C. Barnett, seems to have united with Elisha in a deed of trust dated and recorded in 1811, conveying their interests in the estate, real and personal, of their father, to secure certain debts. There is nothing to show that any action ever took place under that deed, or that any claim was ever asserted under it. And after a lapse of forty-one years, it is not to be presumed that any such

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claim could be asserted successfully. George C. Barnett seems to have left the country and died unmarried; and his interest to have passed to the other heirs, and their deed conveyed it to the appellant, except the part which descended to Elisha; and as he seems to have lived in the country, and not to have labored under any disability, his deposition having been taken as late as 1835, time would bar his claim.

It is further objected that Mrs. Turner R. Henley, who with her husband united in the deed to the appellant, and acknowledged it when she became a widow, had previously united with her husband in a conveyance to another. No such deed is filed. There is a certificate of the clerk of Goochland county that Turner R. Henley has executed a deed of trust conveying all the interest of Henley and wife in the real and personal estate of William Barnett deceased, to secure a debt of one hundred and six dollars and thirty-four cents due to R. K. Dabney. The inference from the certificate is, that Mrs. Henley did not unite in it. There is also a deed filed purporting to be a deed from John V. Miller to John Thompson, jr. dated 20th July 1844, conveying the interest of Henley and wife in the land and personal estate of William Barnett deceased; reciting that it is the same conveyed to said Miller by William Gray and William Miller, trustees, for the benefit of R. K. Dabney, in a deed of trust executed by Henley and wife to them, by deed duly recorded on the 21st of September 1829. This would be anterior to the regular acknowledgment by Mrs. Henley of the deed executed by the heirs to the appellant. But in reference to this share, it is sufficient to say it does not appear she ever signed or acknowledged the deed of trust referred to. It does appear she has regularly executed the deed to the appellant; that he has held possession under it for his own use, and such possession would bar any claim under the deed of trust.

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The parties seem to have treated this matter as clear from doubt. The appellant claimed to be entitled as assignee for value of T. R. Henley of his entire interest in the purchase money for the land. His exception to the report of the commissioner for not allowing him credit for this interest, was sustained, and the credit allowed in the decree.

It is further objected that Mrs. Robert F. Barnett did not unite with her husband, who was a legatee, in the conveyance to the appellant. The contingent right of dower in one-eighth of a tract of two hundred and fifty-seven acres of land of no great value, is too uncertain and trifling to create such a cloud over the title as to affect its price, if sold under the decree.

It does not appear that Betsy Southworth, wife of George Southworth, was ever examined privily and apart from her husband. But she was a plaintiff in this suit. On the death of her husband she continued to prosecute it, and the interlocutory decree for a sale is in her name as widow. A sale would bind her right, and upon the coming in of the report and final decree, an order could be made directing her to execute a conveyance, if required.

Mrs. Nuckols, another of the heirs, seems to have acted by her attorney in fact or agent William Nuckols. No objection is taken in the answer on this ground; and in the account filed by the appellant, and his exceptions, he claims credit for a fee paid for recording a power of attorney from Mrs. Nuckols to William Nuckols. The objection probably was not made because the parties knew of the existence of the power.

I think, upon the whole, that at the time the decree was rendered, in the absence of any suggestion that the purchaser in possession had ever been disturbed, time had effected what it was originally the duty of the vendors to have done, quieted the title. That there was no danger, after such long and exclusive enjoy-

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ment, that the vendee or any purchaser at the sale could ever be disturbed by the assertion of any of the adverse claims relied on in the answer, and that there was no error in subjecting the land to sale when the decree was rendered.

It is furthermore objected to the decree that the commissioner and the court erred in refusing the appellant various credits claimed by him. The appellees held his bonds, and the duty of showing payment devolved on the appellant. As early as October 1835, the cause was referred to a commissioner, to take an account of payments; and from that time down to 1843, when a report was made, repeated efforts were made to compel the appellant to appear before the commissioner to submit his accounts and vouchers for examination. The appellees, for some reason, perhaps because they desired a hearing, seemed to think it devolved on them to have these vouchers exhibited, and therefore moved for rules against the appellant to show cause why he should not be attached for his failure to exhibit his vouchers of payment, if he had any. Their efforts were unsuccessful, and the commissioner was at last constrained to make up his account from the evidence then in the record. The commissioner rejected some claims set forth in an account filed by the appellant with his answer, because no evidence was adduced to sustain them: and none has been adduced since. As to the application of the credits to the first bond; if the appellant had appeared with his proof before the commissioner, it is possible he might have shown that some of the credits applied by the commissioner to the bond lifted by him, were applicable to the second bond with which he has been charged. But these were questions which should have been raised before the commissioner, who, with the parties before him, and when the transactions were fresh, and the parties concerned in them still living, might have ar-

rived at a just conclusion. As the case stood before him, he could make no other application of the credits than he did; and if the appellant is injured thereby, it is the consequence of his own obstinacy in contumaciously refusing to obey orders entered in fact for his own benefit.

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I think the decree was correct on the merits at the time it was rendered: But I am further of opinion, that as the appellant was in no default when the bill was filed, he was entitled to his costs in the court below; and that the decree in giving costs against him is erroneous; and under the authority of *Ross v. Gordon*, 2 Munf. 289, and other cases since, should be reversed as to the costs, with costs in this court to the appellant; and affirmed in all other respects.

The decree was as follows:

The court is of opinion, that at the time the bill was filed the appellant was in no default in resisting a sale of the land conveyed to him until his vendors had complied with the terms of the contract appearing in the condition of the bond dated the 4th January 1828, filed as an exhibit with the answer.

The court is further of opinion, that as the parties might have perfected the title at any time before the hearing, so as under the pleadings to have entitled them to a decree subjecting the land to sale; the lapse of time, the uninterrupted enjoyment and possession of the land under the deed, the absence of any suggestion of any disturbance or the assertion of any adverse claim had at the time the decree was entered, quieted the title in the appellant, and cured all such defects in the title set forth in the answer or disclosed by the record, as should operate to prevent the court from subjecting the land conveyed to sale for the payment of the residue of the purchase money. The court is therefore of opinion, that there is no error in so much

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The court is further of opinion, that there was no error in refusing to allow the appellant, for the alleged deficiency in the quantity of the land sold, or in overruling his exceptions so far as the same were overruled, and in ascertaining the balance of purchase money due from him. But the court is of opinion, that as the appellant was in no default in objecting to a sale when the suit was instituted, he was entitled to his costs; and that said decree was erroneous in awarding costs against him. It is therefore decreed and ordered, that so much of said decree as awards costs against the appellant be reversed and annulled, that the residue of said decree be affirmed, and that the appellees pay to the appellant his costs by him expended as well about his defense in the Circuit court, as in the prosecution of his appeal aforesaid here, and the cause is remanded for a sale, and further proceedings in order to a final decree: which is ordered to be certified.

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Testatrix bequeaths slaves to A, B and C jointly, upon the following trust: To be held by them in trust only for the benefit of her daughter E, (a married woman,) or her heirs. And as it is my wish to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of E, it is hereby wholly and solely confided to the discretion of the aforesaid trustees A, B and C, in what manner the said E shall receive and enjoy the profits arising from the hires or other disposition of the slaves aforesaid. And in the event of the death of E without heirs of her body, then all the slaves and their increase to R. HELD:

1. E took an absolute interest in the slaves; and the bequest over is void.
2. That it is a bequest to the separate use of E.
3. That E separately, or jointly with her husband, had no power to alienate the slaves during her coverture.
4. That the trustees may permit E and her husband to take possession of the slaves, and thus enjoy the profits of them.
5. Two of the trustees having died since the death of the testatrix, the legal title survived to the third; and he may maintain an action to recover one of the slaves which had been sold by the son in law of E, with her consent.

This was an action of detinue to recover a slave, brought in the Circuit court of Buckingham county in December 1848, in which Gustavus A. Rose, the survivor of three trustees, was plaintiff, and George W. Nixon was defendant. Upon the trial the jury found a special verdict, which showed the following facts:

That Mrs. Caroline M. Rose died in 1809, leaving a daughter Emily, then married to William R. Coupland. By her will she bequeathed to Gustavus A. Rose and two others, who had died before this action was commenced, jointly, six slaves by name, upon the following

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trust: "To be held by them in trust only for the use and benefit of my daughter Emily Coupland or her heirs. And as it is my wish and desire to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of the said Emily Coupland, it is hereby wholly and solely confided to the discretion of the aforesaid trustees, (naming them,) in what manner the said Emily Coupland shall receive and enjoy the profits arising from the hire or other disposition of the slaves aforesaid. And in the event of the death of the said Emily Coupland without an heir or heirs of her body, then and in that case, I desire that all the slaves and their increase may be given up to my son Gustavus A. Rose, or his heirs forever."

That after the death of Mrs. Rose, the slaves passed, with the assent of the trustees, into the possession of William R. and Emily Coupland, and have so remained except as herein after stated: That Mrs. Coupland has an only daughter Nancy, married to Wiltshire M. Lewis; and Mr. and Mrs. Coupland, upon the marriage of Nancy, put her husband and herself into possession of two of the trust slaves, being children of one of those named in the deed. That previous to 1848 Lewis had been thus in possession of the slave, for the recovery of which this action was instituted, for five years, under an agreement with Mrs. Coupland to pay her fifty dollars a year hire for him; when, he then living in the town of Lynchburg, and being pressed for money, Mr. and Mrs. Coupland, on the 9th of December 1847, executed a paper under their hands and seals, by which in consideration of their affection for said Lewis, and of one dollar, they conveyed to him this and the other slave which had been put into his possession as aforesaid.

That Lewis not having been able to raise money by pledging the slaves, he about February 1848, received

letters from Mrs. Coupland authorizing him to sell this slave; and he thereupon took him to Richmond and sold him to the defendant for the price of about five hundred and sixty dollars.

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That Mr. and Mrs. Coupland had resided in the county of Cumberland since 1819. And none of the trustees have had any active agency in the management of the property for the last twenty years; but have left the same to the management of Coupland and wife; but Coupland and wife always held and claimed the slaves under the bequest aforesaid. If upon these facts the law was for the plaintiff, they found for him, and assessed the value of the slave at five hundred and sixty dollars, and the damages for his detention at two hundred dollars. And upon this verdict the court gave a judgment for the plaintiff. Whereupon Nixon applied to this court for a *super-sedeas*, which was awarded.

The Attorney General, for the appellant.

Irving & Johnson, for the appellee.

MONCURE, J. I think that the bequest of slaves and other property made by Mrs. Rose to trustees for the use and benefit of her daughter Mrs. Coupland, or her heirs, was of an absolute interest in the property, and not of a life estate only; and that the limitation over to her son Gustavus A. Rose or his heirs forever, in the event of the death of her said daughter without an heir or heirs of her body, is void for remoteness. The cases on this subject are very numerous; and it is unnecessary to review or even cite them; as, in the view which I take of this case, it is immaterial whether the said bequest be of an absolute or of a life estate. I will consider it, for the purposes of this case, as a bequest of an absolute estate.

I am of opinion that it is a bequest for the separate

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use of Mrs. Coupland. Among the words which have been held, *per se*, and independently of any contrary intention to be collected from other parts of the will, to create a trust for the wife's separate use, are the following: "For her sole use and benefit;" "for her sole use;" "for her livelihood;" "for her own use and benefit, independent of any person;" "that she should receive and enjoy the issues and profits." 2 Roper on Legacies by White 1414. White's Leading Cases in Equity, 65 Law Libr. 366, 376. But no particular form of words is necessary; and whenever it appears, either from the nature of the transaction, or from the whole context of the instrument, that the wife was intended to have the property to her sole use, that intention will prevail. 2 Bright on Husband and Wife 211. Though it seems that the intention to give her such an interest, in opposition to the legal rights of her husband, must be clear and unequivocal. Id. 206.

In the case under consideration, whether we look to the particular words used or the whole context of the will, the intention of the testatrix to exclude the marital rights of the husband, and secure the property to the separate use of the wife, is plainly apparent. In the first place, the property is given to trustees; which is a circumstance in favor of the intention to give it to the wife's separate use, though not of itself a sufficient evidence of such intention. 2 Roper 1415. In the second place, it is "to be held by them in trust, only for the use and benefit" of the wife or her heirs. These words are at least as strong as some of those which, we have seen, have been held, *per se*, to create a trust for separate use. It is difficult to perceive any substantial difference between the words "only for the use and benefit of the wife," and the words, "for her sole use and benefit," or the words "for her own use and benefit, independent of any person." In the third place, the testatrix expresses her "will and desire to

guard in the most ample manner against the imprudent sale or other disposition of the property" during the life of the wife; and for that purpose, wholly and solely confides it to the discretion of the trustees, in what manner the wife "shall receive and enjoy the profits arising from the hire or other disposition of the slaves aforesaid."

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Here an intention is plainly indicated that neither the wife nor the husband should have a right to sell or otherwise dispose of the property; which is inconsistent with the idea of its being given, subject to his marital rights; in which case the *jus disponendi* would have been a necessary incident. It is wholly and solely confided to the discretion of the trustees in what manner the wife (not the husband, nor even the husband and wife) "shall receive and enjoy the profits." These are the very words which are used in *Tyrrell v. Hope*, 2 Atk. R. 558; and which the master of the rolls observed could admit of no other construction than that the property should be for the wife's separate use. He asked to what end she should receive the profits if they were to be the husband's property the next moment; and added that the word "enjoy" was very strong to imply a separate use to the wife. 2 Bright 211. The intention to create a trust for the wife's separate use is at least as plain in this case as is that of *West v. West's ex'ors*, 3 Rand. 373, in which this court unanimously held that a separate estate was given. See also *Scott v. Gibbon*, 5 Munf. 86, *Smith v. Smith's adm'rs*, 6 Id. 581; *Markham v. Guerrant*, 4 Leigh 279; *Lewis v. Adams*, 6 Id. 320; and *Perkins' trustee v. Dickinson*, 3 Gratt. 335.

I am further of opinion that Mrs. Coupland has no power to alien her separate estate or any part of it. The *jus disponendi* is an inseparable incident of property held by a person who is *sui juris*. But nothing is now better settled than that it may be severed from

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the separate estate of a *feme covert*. 2 Bright, ch. vii, p. 274; *Steedman v. Poole*, 6 Hare's R. 193, 31 Eng. Ch. R. 193; and other cases cited by Bright. In respect of her separate estate she is considered in equity as a *feme sole*. "Her faculties as such and the nature and extent of them (says Lord Langdale,) are to be collected from the terms in which the gift is made to her, and will be supported by equity for her protection."—"If the gift be made to her sole and separate use without more, she has, during coverture, an alienable estate independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has during the coverture, the present enjoyment of an unalienable estate independent of her husband."—"The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it." *Tullett v. Armstrong*, 1 Beav. R. 1, 17 Eng. Ch. R. 132, "When the court first established the separate estate, (says Lord Cottenham) it violated the laws of property between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy a separate estate as a *feme sole*, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." *Same Case*, on appeal, 4 Mylne & Craig, 377, 18 Eng. Ch. R. 405.

This is the doctrine in England. In the United States, the right to restrict the power of alienation of a separate estate is universally admitted. In many of the states it has even been held that the wife has no such power, unless it be given her by the instrument

which creates the estate. It has been so held, it seems, in South Carolina, Pennsylvania, Tennessee and Mississippi. See the cases cited in the notes of Hare and Wallace to White's Equity Cases, 65 Law Libr. 370-378.

In the case of the *Methodist Episcopal Church v. Jaques*, 3 John. Ch. R. 77, Chancellor Kent was of opinion, that "instead of holding that the wife is a *feme sole* to all intents and purposes as to her separate property, she ought only to be deemed a *feme sole, sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given and to be exercised only in the mode prescribed, if any such there be."—"Perhaps we may say, that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large to the discretion or necessities of the wife; and this is the most that can be inferred." On appeal to the Court of errors this opinion was pronounced to be erroneous, and it was held that a *feme covert* may dispose of her separate estate as if she were a *feme sole*, unless specially restrained by the instrument under which she acquires it; and that the specification of any particular mode of exercising her disposing power, does not deprive her of the right to pursue any other mode not expressly, or by necessary construction, negatived in the settlement. 17 John R. 548. In Virginia, the right to restrain or interdict the power, has been expressly recognized and affirmed in several cases. *West v. West's ex'or*, 3 Rand. 373; *Vizonneau v. Pegram*, 2 Leigh 183; *Williamson v. Beckham*, 8 Leigh 20; *Lee v. The Bank of the U. S.* 9 Leigh 200. The only question seems to have been whether the specification of one mode of disposition in the settlement is an implied

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exclusion of the right to pursue any other: and that question seems not yet to be finally settled. Judge Tucker maintained the affirmative side of the question in the two cases last cited: and the decision of the first of the two cases, so far at least as he was concerned, was founded on that view. Judge Cabell, on the other hand, was decidedly of opinion that even in regard to personal property the weight of authority is the other way; but in regard to real estate, (which a *feme covert* may dispose of in the mode prescribed by the statute unless interdicted by the instrument which settles it upon her, and can dispose of only in that way unless authorized by such instrument to dispose of it in some other,) he maintained that the grant of authority to dispose of it in some other way does not, of itself, exclude the power to dispose of it in the statutory mode. He could not perceive the force of the argument which infers diminution of power from its extension; nor how the express grant of a power which the wife without such grant *had not*, can be made to take from her a power which she *had* without the grant. He distinguished the case of *Lee v. The Bank of the U. S.* in which this opinion was given, from the case of *Williamson v. Beckham*, on the ground that in the latter an intention to exclude all other modes of alienation than that prescribed in the settlement was apparent upon its face. Judge Brockenhough concurred in Judge Cabell's opinion, which prevailed, the court being composed of three judges. See *Woodson, trustee, v. Perkins*, 5 Gratt. 345.

The right to restrain or interdict the power of alienation of a separate estate being thus established, the question now arises, whether such right was exercised by the testatrix in this case? I think that it was. It is not necessary that the power should be excluded in express terms. It may be excluded by implication. Its exclusion is often, if not generally,

necessary to effectuate the objects of the settlement, and to protect the wife as well from her own weakness, as from the power and influence of her husband. The law therefore favors the intention to exclude it, and will give effect to such intention whenever it can be ascertained by a fair construction of the settlement. There can be no doubt, I think, of the intention of the testatrix in this case to exclude the power of alienation. Such a power would be inconsistent with the express terms, and the whole frame and purpose of the settlement. The testatrix expresses her wish and desire to guard in the most ample manner against the imprudent sale or other disposition of the property during the life of the wife, and wholly and solely confides to the discretion of the trustees in what manner the wife shall receive and enjoy the profits of the property; which property, in the event of the death of the wife without an heir or heirs of her body, is directed to be given up to Gustavus A. Rose, or his heirs forever. Could plainer language have been used to show the intention of the testatrix that the wife should receive and enjoy only the profits, and should have no power to dispose of the property itself? Would not the existence of such a power be in conflict with the declared intention of the testatrix, not only in regard to the wife, but also in regard to Gustavus A. Rose? Although the limitation to the latter may be void, it yet serves in part to show, if the fact be not otherwise sufficiently shown, that the power to dispose of the property was not intended to be given to the wife. It cannot be necessary to say any thing more on this branch of the subject.

If the power of disposition was not given by the will it has not been acquired by any thing which has since happened in this case. It can arise from no act or laches of the trustee; who, no more than the wife or her husband, can defeat the provisions of the settle-

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ment. The possession of the husband and wife was consistent with the trust, and was a mode of enjoyment of the profits of the property which the trustees had a right to permit.

It results from what I have said, if it be well founded, that neither Coupland and wife nor Mrs. Coupland had any power to sell or convey the slave in controversy; and consequently that the plaintiff in error, who claims only under them, is not entitled to the slave. It now remains only to enquire whether the defendant in error is entitled.

The bequest was to three trustees jointly, of whom the defendant in error is the sole survivor. There can be no doubt but that the three trustees, if all alive, would be entitled to demand, recover and hold the slave in trust under the will. The interposition of trustees seems at one time to have been considered necessary to protect the wife's separate interest. It has been long settled, however, that if no trustees be interposed by the settlement, the husband will be held in equity to be a trustee for the wife. Still, it is generally, if not always, better to have disinterested trustees; who will be appointed by a court of equity if necessary. The legal title remains in the trustees during the continuance of the trust; whether, in its general character, it be an active or a passive trust: for it is liable at any time to be stimulated to activity by any attempt to divert the property from the purposes of the trust. In this case a large discretion was given to the trustees in the management of the property. Though they were authorized, in their discretion, to permit the husband and wife to hold it, yet they had a right to take possession at any time, and it was their duty to do so whenever the safety of the property required it. Whether, the trust being joint the defendant can alone perform it or not, the legal title to the property is in him by survivorship, and he

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has therefore a right to recover it at law. A right of action accrued to him for the slave in controversy at the time of the sale to the plaintiff in error, who became responsible for hires also from that time as a legal incident of property wrongfully withheld from the legal owner. Whether the plaintiff in error is entitled to any, and if any, what relief in equity, is a question which it is unnecessary, and would be improper, to decide in this case.

I am for affirming the judgment.

The other judges concurred in the opinion of **Moncure, J.**

JUDGMENT AFFIRMED.

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ADDINGTON v. ETHERIDGE, *coroner.*

(Appeal ALLEN, P.)

May 22.

H, a merchant, conveys to L all his stock of goods, and the store-house for the current year, in trust to pay certain debts described in the deed. And the deed provides, that H shall keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store, until default in the payment of any of the debts secured, and until the trustee shall be requested by any of the said creditors to close the deed by a sale. The deed is fraudulent *per se*, and void as to the creditors of H.

This was an action of debt in the Circuit court of Norfolk county upon an indemnifying bond brought by William Etheridge, coroner, acting as sheriff, for the benefit of William M. Levy, against William H. Addington and two others, his sureties in the bond. On the trial the plaintiff introduced a deed bearing date the 19th of January 1852, and recorded the same day, by which Walter P. Harrison, a merchant of Portsmouth, conveyed to William M. Levy all his stock of goods and store furniture in the store occupied by said Harrison, and also the store for the balance of the year, in trust to pay certain debts described in the deed. These debts were divided into four classes, and were to be paid in the order of the classes. The two first embraced debts for which negotiable notes had been given and discounted for the benefit of Harrison, and which would fall due, one of them within three days of the date of the deed, and the others at from thirty to ninety days.

The deed provided that Harrison should keep possession of and sell the stock of goods, in the usual

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line of his trade, and occupy the store, until default in the payment of any of the debts secured, or until the trustee should be requested by any of the said creditors to close the deed by a sale. And then the trustee was authorized to sell and pay according to the order of priority stated in the deed.

It was also proved that Addington was a creditor of Harrison by judgment confessed after the deed was recorded, and that he had recorded an execution on the goods to satisfy his judgment; and that all the proceedings under the said levy were regular.

After the evidence was closed, the defendants moved the court to instruct the jury as follows:

First. That if they believed that the said deed from Harrison to Levy was given with intent to delay, hinder or defraud creditors of what they were lawfully entitled to, that the said deed is void as to said creditors.

Second. That the fact that the goods mentioned in the said deed were, by the authority of the said deed itself, to remain in the possession of the said Harrison, as in the said deed mentioned; and that he was thereby empowered to make sales of them, as in the said deed mentioned, and to account to the said Levy the trustee, as required by the said deed, rendered the said deed fraudulent and void *per se* as against the defendant Addington. But the court refused to give the instructions, and the defendant excepted. There was a verdict and judgment for the plaintiff for one thousand five hundred dollars. And thereupon Addington applied to this court for a *supersedeas*, which was awarded.

Tazewell Taylor, for the appellant.

Patton, for the appellee.

DANIEL, J. delivered the judgment of the court:
It seems to the court, that as it appears from the

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bill of exceptions that no evidence was offered to prove the intent with which the deed from Harrison to Levy, therein set forth, was executed, other than such as was afforded by the provisions of the deed itself, the question whether the said deed was fraudulent *per se* or not, was one to be decided by the court on an inspection of said deed, and not proper to be submitted to the jury; and as the first instruction proposed by the plaintiffs in error sought to refer that question to the jury, it was not an error in the Circuit court to refuse to give said instruction.

It seems further to the court, that the clause in said deed, by which it was stipulated that the grantor W. P. Harrison should keep possession of and sell the stock of goods thereby conveyed, in the usual line of his trade, and hold, occupy and enjoy the store until default in the payment of any of the debts thereby secured, or until the trustee William M. Levy should be requested by any of the creditors in said deed mentioned to close said deed by sale, is explained by the clause immediately succeeding, in which it is declared that the said trustee is thereby empowered, in the event of default in the payment of any of the said debts by the said Harrison, when at maturity, upon the request of any of the said creditors, to dispose of the property in said deed conveyed; and that it was the purpose of the grantor in said deed to retain to himself the power to keep possession of and sell the said stock of goods until default should be made in the payment of said debts, *and* until the trustee should be requested by any of the creditors to close the deed by sale.

And it seems further to the court, that this power is one incompatible with the avowed purpose of the grantor to furnish an indemnity to his creditors; is equivalent in its effects to a power of revocation; and fully adequate to the defeat of the provisions of the deed. And therefore, that said deed is, according to

the principles adjudicated by this court in the cases of *Lang v. Lee*, 3 Rand. 410, *Sheppard v. Turpin*, 3 Gratt. 373, fraudulent *per se*, null and void. 1855. April Term.

And it seems therefore further to the court, that the Circuit court erred in refusing to give the second instruction asked for by the plaintiffs in error.

It is therefore considered by the court, that the judgment of the said Circuit court be reversed and annulled, with costs, &c. the verdict of the jury set aside, and the cause remanded for a new trial, with instructions to the said Circuit court, if upon said trial the same instructions shall be asked, to refuse to give the first, and to give the second.

JUDGMENT REVERSED.

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CLARK v. WARD & *als.*

May 22.

1. W, living in Virginia, determines to remove to another state; and in pursuance of that purpose, leaves the place where he has resided, and proceeds directly to the place where he intends to reside. He is a nonresident of the state in the sense of the attachment law, directly he commences his removal, and before he gets beyond the limits of the state.*
2. A deed is made conveying personal property to trustees for the purpose of paying debts specified therein; and the trustees take possession of the property and proceed to sell it for the purposes of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, this was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.
3. A creditor secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed, to the payment of his debt, in preference to the other creditors secured by the deed; but he fails. This does not preclude him from his right to claim under the deed his ratable proportion of the trust fund.
4. The endorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate.†
5. The attachment is served upon trustees in a deed of trust for the payment of certain debts, and among them are the debts due to the plaintiff in the attachment. There could therefore be no surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there can be no surplus in their hands liable to his attachment.

*The act, Code, ch. 151, § 1, p. 600, and the act, Sessions Acts of 1852, ch. 95, p. 78, authorizes an attachment "against a person who is not a resident of this state." The act of 1819, 1 Rev. Code, ch. 123, § 1, p. 474, authorized an attachment in equity against defendants "who are out of this country."

†The act, Code, ch. 151, § 7, p. 602, says the attachment shall be sufficiently levied "as to real estate, by such estate being mentioned and described by endorsement on such attachment."

6. The creditor having stated in his bill and proved, that his debtor had assigned to him certain railroad stocks, and a bond secured by a deed of trust, as a security for one of his debts, and the deed conveying all the debtor's stocks and debts to the trustees, though they disclaimed any right to or possession of the stocks and bond assigned to the plaintiff, they are interested for the creditors, to see that the fund assigned to the plaintiff is properly applied to the satisfaction of his debt: And therefore, though there is nothing in their hands on which the attachment can operate, the bill should not be dismissed; but the court should proceed to have the assigned property properly disposed of and applied; and to give the plaintiff relief according to his rights under the deed.

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On the 28th of June 1853, between the hours of 10 and 11 o'clock A. M. William M. Clark sued out of the clerk's office of the Circuit court of Frederick county a *subpoena* in chancery against Henry P. Ward, George W. Ward and C. Lewis Brent, returnable to the next July rules. On this *subpoena* a memorandum was endorsed, by which the officer to whom it was directed was ordered to attach the debts due and to become due by the defendants George W. Ward and C. Lewis Brent to the defendant Henry P. Ward, and also any other estate of that defendant whether in his own hands or in the hands of the other defendants, so that the said defendants be restrained from paying or conveying away the debts by them owing to, or the estate or effects in their hands of, the said Henry P. Ward, until the further order of the court. The sheriff endorsed on this *subpoena*, that it was received at seven minutes past 11 o'clock A. M. It was returned "executed on George W. Ward and Brent. H. P. Ward is not an inhabitant."

On the same day on which the *subpoena* was sued out, Clark filed his bill, in which he stated that Henry P. Ward was indebted to him in three sums of money, which he paid as security for said Ward, amounting to about one thousand two hundred dollars. That for

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one of these debts Ward had assigned to him as security twenty-three shares of the stock of the Winchester and Potomac railroad company, and also a claim on Alexander Clark, due by note, for about two hundred and fifteen dollars; but that neither the scrip nor the note was delivered to him at the time or since, so that he had no means of collecting the note, and the scrip could only be transferred on the books of the company by the said Henry P. Ward in person, or by his attorney in fact, or by a decree of a competent court; and by no other means could be made available.

He further stated that the said Henry P. Ward was not a resident of the state of Virginia, and that George W. Ward and C. Lewis Brent had in their possession goods, effects and estate and property of various kinds belonging to the said Henry P. Ward, and were indebted to him for money received for him sufficient to pay plaintiff's debt. And making the three parties defendants, he prayed that the goods, estate and property of Henry P. Ward in the hands of the other defendants, and the moneys due from them to Henry P. Ward, might be attached, and they be restrained from paying or conveying the same until the future order of the court; and that the said stock of the railroad company might be sold under the decree of the court for the benefit of the plaintiff; and for general relief.

The defendants George W. Ward and C. Lewis Brent answered the bill. They said that they knew nothing of the indebtedness alleged in the bill, of Henry P. Ward to the complainant, or of the alleged assignment of the railroad stock and the claim on Alexander Clark; that neither the stock nor the claim had come into their hands or under their control. That they were not aware, and therefore could not admit, that Henry P. Ward, at the time of filing the bill or the issue of the *subpœna*, was a nonresident of the state of Virginia. And they denied that they or

either of them then had or at the time of filing the bill had, in their possession any goods or effects, estate or property of any kind belonging to Henry P. Ward, or that they or either of them then owed or at the filing of the bill owed him for money received for him, to any amount. The bill was taken for confessed as to Henry P. Ward.

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The evidence was clear that Henry P. Ward was indebted to the plaintiff as stated in the bill, and that he had assigned the railroad stock and the claim on Alexander Clark as a security for one of the debts. The proofs further show that in March 1853, Henry P. Ward was a merchant doing business in the town of Winchester; that he had become embarrassed to insolvency, and by a deed bearing date the 14th of that month, he conveyed to George W. Ward and C. Lewis Brent, the whole of his property, consisting of real estate, his interests in estates of deceased persons, all his stock of goods, debts due to him, household furniture, and any stock that might be held by him in any joint stock company, in trust, to pay a large amount of debts specified in the deed; and among these were the debts due to the plaintiff Clark. These with the large mass of debts were placed in the second class in the deed: And it was provided that the trustees should sell the real estate and goods at any and such times within six months from the date of the deed, at public or private sale, either for cash or upon such credit as they should think would best promote the interest of the creditors; and until the goods were disposed of the trustees might dispose of them at private sales, and employ an agent to conduct the store, looking only to the interest of the *cestuis que trust*.

This deed was admitted to record upon the following certificate, viz:

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Frederick County, viz.:

On the 14th day of March 1853, Henry P. Ward personally appeared before me, a justice of the peace for the county aforesaid, and acknowledged the above and foregoing deed of trust bearing date the 14th of March 1853, to be his act and deed, for the purposes therein mentioned. Given under my hand.

J. P. RIELY, J. P.

It appears that within a few days at farthest, the trustees took possession of the goods valued at about four thousand dollars, and they were sold in the month of March, April, May and up to June. That from the date of the deed up to the 28th of June, Henry P. Ward resided with N. Brent in Winchester, except for a short time, when he was absent, a part of the time in Philadelphia and a part in the county of Culpeper. That he left Winchester on the 28th of June, about 9 o'clock A. M. upon the Winchester and Potomac railroad for Philadelphia, with the purpose of residing there. That on reaching Harpers Ferry he remained there until between half past 2 and 3 o'clock P. M. when he took the cars for Baltimore, intending to go directly on to Philadelphia.

The cause came on to be heard in November 1853, when the court being of opinion that Henry P. Ward was not to be treated as a nonresident of this state at the time of the institution of the suit, decreed that the bill should be dismissed, with costs to the defendants George W. Ward and Brent. From this decree the plaintiff applied to this court for an appeal, which was allowed.

This case was elaborately argued in writing by Steger, for the appellant, and Conrad & Tucker, for the appellees.

Steger, insisted, 1st. That in the sense of the statute, Code, ch. 151, § 1, p. 600, Henry P. Ward was not a resident of the state at the time the process was issued. That having left Winchester with the purpose to settle in Philadelphia, whether he had passed beyond the limits of the state or not at the time, he was not a resident here: That imported a permanent abiding, which was not the condition of a man who was in the act of removing with the purpose not to return, but to fix his residence elsewhere. He referred to *Roosevelt v. Kellog*, 20 John. R. 208; the case of *Wrigley*, 8 Wend. R. 134; and Drake on Attachments, § 82, 83, 84, 85, as sustaining his construction of the statute. Drake, § 85, says, "It follows from these views of what constitutes a resident or inhabitant, that change of abode *sine animo revertendi* makes one immediately a non-resident of the place from which he departs. He also referred to *Farrow v. Barker*, 3 B. Monr. R. 217; *Davis v. Thomas*, 5 Leigh 1; and *Moore v. Holt*, 10 Gratt. 284. And he referred to the change in the language of the act from that of the act of 1819, in which the words are, "out of this country." 1 Rev. Code, ch. 123, § 1, p. 474. In the Code the language is, "not a resident of this state."

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2d. That if Henry P. Ward was not a non-resident of the state, it was error to dismiss the bill as to him. That as to him the plaintiff was entitled to come into equity to have the railroad stock subjected to the satisfaction of his claim. That as to this branch of the cause the other defendants disclaimed all interest; and it was therefore simply a question between the plaintiff and Henry P. Ward. That clearly as to him and as to this subject the statute gives the court jurisdiction: It requires the suit against an absent defendant to be brought in the county where his estate is: And in this case it was so brought, and the sheriff returned

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that he was no inhabitant. See Code, ch. 169, § 1, p. 641.

3d. That the deed of March 14th, 1853, was not duly recorded; and was therefore void as to creditors. That the act, Code, ch. 118, § 5, p. 508, declares that every deed of trust shall be void as to creditors, "until and except from the time that it is duly admitted to record." And it further directs the various modes in which deeds shall be admitted to record. Code, ch. 121, § 2, 3, p. 512. In this case the certificate of the justice was fatally defective: First, in not stating that the county of Frederick, in which the person making the certificate was a justice, was in the state, as is required by the act; second, in not stating that Henry P. Ward's name was signed to the deed, which is also required by the statute; and third, in not stating that the acknowledgment was made in the county of Frederick. A justice of the peace cannot act out of his county, and therefore it is required that it shall be stated that the acknowledgment was taken in the county where the justice has authority to take it. And for the strictness required in such cases, he referred to *Turner v. Stip*, 1 Wash. 319; *Harrey v. Alexander*, 1 Rand. 219; *Lockridge v. Carlisle*, 2 Leigh 186; *Currie v. Page*, 2 Leigh 617; *Harkins v. Forsyth*, 11 Leigh 294; *Hirston v. Randolph*, 12 Leigh 445; *Healy v. Rowan*, 5 Gratt. 414; *Carper v. McDowell*, 5 Gratt. 212.

He insisted further, that if the sale was an absolute sale, it was fraudulent and void, because there was no consideration for it. If it was in trust, as it clearly was, then it was void unless it was duly recorded. *Bird v. Wilkinson*, 4 Leigh 266; *Lane v. Mason*, 5 Leigh 520. And if it was void, then the property embraced in it is subject to an attaching creditor precisely in the same manner and to the same extent as if

the deed had not been made. *Peay v. Morrison*, 10 Gratt. 149; *Gibson v. White*, 3 Munf. 94.

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Conrad & Tucker, insisted, 1st. That even if the deed was not duly recorded, yet as the trustees had taken possession of the property and sold it, and in fact had paid over the greater part of the proceeds of the sales to the *cestius que trust* before the attachment was issued, that the debtor certainly had no claim or right to the money in the hands of the trustees, and the attaching creditor could not therefore be entitled to it. *Schofield v. Cox*, 8 Gratt. 533; *Glas-sell v. Thomas*, 3 Leigh 113. That the property attached being personal chattels, its delivery under a *bona fide* transfer of title, for a lawful purpose, consummated the title of the trustees as against both Ward and his creditors, even if no writing had been used to pass the title or declare the trusts. 1 Black. Com. book 2, ch. 25; *Power v. Walker*, 3 Maule & Selw. 7. And if possession be taken at any time before an adverse execution, though long after the date of the deed, it will be valid. *Jones v. Dwyer*, 15 East's R. 21; *Glasscock v. Batton*, 6 Rand. 78; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; *Mair v. Glen-nie*, 4 Maule & Selw. 240; *Eastwood v. Brown*, 21 Eng. C. L. R. 447.

2d. That the deed was duly recorded. That though the statute gives a form of certificate, it only requires a substantial compliance with it. *Horsley v. Garth*, 2 Gratt. 471. That when a justice performs an official act and certifies it, the presumption of law is, that it was done where he had authority to do it. And it is equally a presumption of law that the party acknowledging the deed is the grantor in it, as the name is the same.

3d. That the attachment did not lie under the circumstances of this case. First, because the debtor

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had no property in the state or debts due to him; and second, because Henry P. Ward had not ceased to be a resident of Virginia when the process was issued. To effect a change of domicil, there must concur an actual removal with the intention to reside in the place to which the party has removed. 1 Bouvier's Inst. 99; *Jennison v. Hapgood*, 10 Pick. R. 77; *Cooper v. Galbraith*, 3 Wash. C. C. R. 546. A mere intention to remove, unless such intention is carried into effect, is not sufficient to operate the change. 1 Greenl. Evi. § 108; *The State v. Hallett*, 8 Alab. R. 159.

DANIEL, J. delivered the opinion of the court:

It seems to the court, that at the time of the issuing of the *subpœna* and attachment in this case, the appellee Henry P. Ward was in fact, and in the true sense and meaning of the statutes regulating the subject, not a resident of this state.

It however seems further to the court, that there was no levy of said attachment on any real estate of the said Ward, no such estate being mentioned or described by endorsement on said attachment.

And the court, without deciding whether the certificate of J. P. Riely of the 14th day of March 1843, of the acknowledgment before him, by the said Ward, of the deed of trust of the same date, was sufficient in law to authorize the recording of said deed, is of opinion, that as the deed aforesaid purports to grant, assign and deliver to the trustees, George W. Ward and C. Lewis Brent, all the estate, property and effects therein intended to be conveyed; and as it appears from the evidence, that the execution of said deed was accompanied or in good faith soon followed by a delivery of the personal property in said deed mentioned, there was a complete and valid transfer of said property to the said George W. Ward and C. Lewis Brent; and that the recording of the deed was in no

wise essential to the protection of said property against the demands of creditors who had not acquired liens on the same before said transfer was consummated; and that as by the terms of the deed aforesaid, the payment of all the debts claimed by the appellant against the appellee Henry P. Ward, is expressly provided for, and so there can be no surplus in the hands of the trustees, after satisfying the demands of the creditors therein provided for, in which the appellant could have any interest, (as his own claims would be paid before such surplus could arise,) there was no property of the said Henry P. Ward in the hands of the said trustees liable to the attachment of the appellant.

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The court is, however, also further of opinion, that the effort of the appellant to invalidate said transfer on the ground that the deed was not duly recorded, and to subject the property therein mentioned to the payment of his demands in preference to the other creditors therein secured, did not preclude him from a right to demand and have of the trustees his ratable portion of the proceeds of the property in their hands, in accordance with the provisions of said deed.

And the court is further of opinion, that as it is alleged in the bill and proved by an exhibit filed therewith, that the said Henry P. Ward, on the 12th of October 1852, assigned to the appellant certain scrip for five hundred and seventy-four dollars of stock of the Winchester and Potomac railroad company, and also a claim on Alexander Clark, due by note, and secured by a deed of trust on his property, as a security to indemnify the appellant on account of his acceptance of a draft for five hundred dollars, which is one of the debts provided for in the deed of trust of the 14th of March 1853: And as by the said deed the said Henry P. Ward assigned to the said trustees all money due him by bonds, notes or otherwise, and all stock that may be held by the said Henry P. Ward in any

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joint stock company; and as the appellant admitted in his bill that the amount of his claims against the said Henry P. Ward was properly subject to the off-set of a store account, the amount of which was not known, the said trustees, though having in their hands nothing amenable to the attachment, were yet interested as representing the creditors, in seeing to a proper settlement of accounts between the appellant and the said Henry P. Ward, as also to a sale of the stock aforesaid and a collection of the claim on Alexander Clark, and a proper application of the proceeds to the payment of the draft aforesaid.

And the court is therefore also further of opinion, that whilst the Circuit court properly refused to subject the property in the hands of the trustees, to the satisfaction of the claims of the appellant, in preference to the debts of other creditors provided for in the deed of trust, it erred in dismissing the bill, except so much thereof as sought to subject the property of Henry P. Ward in the hands of the trustees, to the attachment. Therefore it is decreed and ordered, that the decree aforesaid, except in the particular just mentioned, be reversed and annulled, and that the appellee Henry P. Ward pay to the appellant his costs, &c. And it is ordered that the cause be remanded to the said Circuit court, in order that the balance due by the said Henry P. Ward to the appellant may be ascertained, and a personal decree rendered theretofor; also a decree for the sale of the stock aforesaid in the Winchester and Potomac railroad company, and the application of the proceeds of sale towards the discharge of the appellant's demand, with liberty to the appellant to amend his bill and make new parties, if so advised, with a view to obtain a decree for the sale of the property mentioned in exhibit No. 3, as conveyed by deed of trust to secure the note therein also mentioned, and for a like application of the proceeds

of such sale; and also a decree for the payment by
the trustees of the share or portion of the trust fund
which may be applicable under the provisions of the
deed of trust of the said Henry P. Ward of the 14th
day of March 1853, to the residue of the appellant's
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LOHRS v. MILLERS' lessee.

August 20.

H is the owner of a tract of land in 1797. Two papers purporting to be deeds bearing date in that year, one from H to G and the other from G to M, conveying this land, are by order of the proper court directed to be admitted to record, and are recorded; though they are not duly authenticated. M enters the land as his on the books of the commissioner of the revenue; and in 1815 it is sold as the land of M as having been forfeited for non-payment of taxes, and conveyed by the sheriff to B, who enters it on the books of the commissioner; and it has been ever since held by B and those claiming under him; and all the taxes charged on the land have been paid or released. In 1843 a patent is obtained for the land by L, who enters it with the commissioner and pays the taxes thereon regularly. HELD: That under the circumstances the title of the parties claiming under B is valid; and the land was not forfeited under the act of 1835, as the land of H, to the junior patentee L.

This was an action of ejectment in the Circuit court of Barbour county, by the lessee of Martin Miller and others against Peter and Peter P. Lohr. The case is stated by Judge SAMUELS in his opinion. There was a verdict and judgment for the plaintiffs; whereupon the defendants obtained a *supersedeas* from this court.

Haymond, for the appellants.

Hoffman, for the appellees.

SAMUELS, J. This cause is brought here by writ of error to a judgment for the plaintiff below, in an action of ejectment, in which John Doe, on the joint and several demises of Martin Miller and others, was plaintiff, and Peter Lohr and Peter P. Lohr were defendants. The parties, by consent entered of record, waived the right to have a jury, and thereupon the whole matters of law and fact were heard and deter-

mined, and judgment given by the court. Code, ch. 162, § 9, p. 629.

The plaintiff, to prove his title, gave in evidence a patent from the commonwealth to Levi Miller, the ancestor of plaintiff's lessors, for four hundred acres of land, and bearing date September 30th, 1843. He proved that the land thus granted to Miller was entered on the commissioner's books in the name of the grantee Miller, for the years 1844 and 1845, and the taxes imposed by law regularly paid within the years respectively in which they were so charged. That Miller the grantee died in 1845, leaving the lessors of the plaintiff his children and heirs at law; and that the land in 1846, and each year since that time, was charged on the commissioner's books to the lessors of the plaintiff, and the taxes imposed for each year respectively regularly paid by the lessors of the plaintiff. The plaintiff also gave in evidence the plat and report of the survey made in the cause.

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The defendants gave in evidence a patent from the commonwealth to James Arnold for one thousand one hundred and forty acres of land, and bearing date the eighteenth day of April 1789; also a deed of bargain and sale from James Arnold to Ignatius Hayden, bearing date December 25th, 1789, for five hundred and forty acres of land, parcel of the land included by the patent last above mentioned. They also offered in evidence certain paper writings, purporting to be copies of deeds recorded in the clerk's office of Randolph County court; (in which county the land in controversy laid until the county of Barbour was formed; after which it lay in the latter county.) These alleged deeds were, one from Ignatius Hayden to Ignatius Gough, bearing date April 29th, 1797, for three hundred and forty acres of land, parcel of the five hundred and forty acres conveyed by Arnold to Hayden, as above stated; the other from Gough to Meshach

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Hyatt, bearing date May 12th, 1797, for the same land. These copies were rejected by the Circuit court as inadmissible evidence.

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The defendants further gave in evidence a deed bearing date December 25th, 1815, from John Crouch, sheriff of Randolph county, to Luke Bryant, purporting to convey three hundred and forty acres of land theretofore belonging to Meshach Hyatt, which had been returned delinquent for nonpayment of taxes, and sold by said sheriff to Bryant, as the law prescribed.

The defendants further gave in evidence a deed from Luke Bryant to Ezra Hyatt, bearing date May 25th, 1819, conveying the same land which Crouch as sheriff had sold and conveyed to Bryant.

It appears in the record that Meshach Hyatt paid into the treasury of the commonwealth the taxes imposed by law on three hundred and forty acres of land in Randolph county, for the years 1801 to 1807, inclusive; that for the years 1808 to 1815, inclusive, it was entered on the commissioner's books of Randolph county, and charged with taxes in the name of Meshach Hyatt, and that it was delinquent for nonpayment of taxes for the years 1808 to 1814, inclusive; that it was sold and conveyed by Crouch the sheriff to Luke Bryant for such delinquency as is already said. That in the years 1816 and 1817, the quantity of three hundred and forty acres of land was charged with taxes to Luke Bryant on the commissioner's books; a tract of like quantity was so charged in 1818 to Israel and Jesse Hyatt; from 1819 to 1840, inclusive, the like quantity was so charged to Ezra Hyatt; that the taxes for 1815 to 1824, inclusive, and for 1827, were paid to the sheriff of Randolph county; that the taxes for 1825 and 1826 and for 1832 to 1837, inclusive, were paid into the treasury of the commonwealth. That the land tax for the years 1838 and 1839 being unpaid in 1840, the sheriff of Randolph sold the land

as the property of Ezra Hyatt, for his said delinquency, and that Eli Butcher became the purchaser. No deed from the sheriff to Butcher is shown that the plaintiffs here are in possession, holding as tenants under Eli Butcher.

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The defendants below further give in evidence a deed from a number of parties, calling themselves devisees of Ezra Hyatt, and purporting to convey to Eli Butcher the three hundred and forty acres above mentioned. The record, however, shows no copy of Ezra Hyatt's will, nor any proof that these parties had the right which they profess to convey.

It further appears that the land conveyed by Arnold to Hayden has never been entered on the commissioner's books in Hayden's name; and that neither Arnold nor Hayden in person or by tenant had actual possession of any portion of said land; that Lohr, &c. the defendants below, were in possession as squatters from 1840 to 1844, and in possession as tenants of Eli Butcher from 1844 to the time of bringing this suit.

The parties, upon these facts, submit the question of title to the court. The plaintiff below relies upon the act of February 27, 1835, ch. 13, § 2, p. 12, to show that the commonwealth by forfeiture acquired title to the five hundred and forty acres of land conveyed by Arnold to Hayden, for the omission to enter the land on the commissioner's books and have it charged with taxes, as that act requires.

The defendants below insist that enough is shown to withdraw the three hundred and forty acres claimed by them from the operations of the statute.

The case, in this aspect of it, depends wholly upon the question whether the commonwealth acquired title to the land in controversy under the act of 1835, above referred to; because if she so acquired title, the grant to Miller, under the provisions of subsequent acts of assembly, passed her title to him.

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It is apparent from the record that two separate paper writings were exhibited to the County court of Randolph county, at its July term 1797: the one purporting to be a deed from Ignatius Hayden to Ignatius Gough for three hundred and forty acres of land; the other purporting to be a deed from Ignatius Gough to Meshach Hyatt for the same quantity of land; and that these papers were ordered by the court to be recorded.

It is further apparent that these papers were in fact recorded, although, as is alleged, and as the Circuit court decided, improperly recorded, as being defectively authenticated. I deem it unnecessary for the purposes of this case to consider whether the deeds, or either of them, were properly copied into the deed books of the office; and whether office copies of them could be used as evidence in a controversy about the title. I am of opinion that as the deeds (especially that from Gough to Hyatt) were in fact copied into the deed books under the order of a court having authority over the subject, as and for a registry thereof, it became the duty of the clerk and of the commissioner of the revenue to cause the land to be entered on the commissioner's books and charged with taxes. It was wholly beyond their official duty to review the action of the court; or to place themselves in the position of creditors, or purchasers for value without notice; and to say that inasmuch as persons of these classes might not be affected by this registry, so these officers would not notice it, nor were they bound to perform any duty in consequence thereof. Neither Hayden, nor any creditor or purchaser claiming through or under him, sets up any title of his; nor has the propriety of the registry been questioned from 1797 to 1843. The attempt is now made to convert the commonwealth herself into a party complaining thereof. Of what can she complain? Her taxes from 1797 to 1800

after this lapse of time we must presume to have been paid; or if not paid, they were certainly released by act of assembly. It is distinctly proved that the taxes for every year from 1801 to 1839, inclusive, have been either paid or released by law. As the commonwealth has received what is called in the law "her just demands," one of the grievances recited in the act of 1835, as the reason for that enactment, does not exist. It is impossible to perceive how the "delay" and "embarrassment" in the "settlement and improvement" of the country, recited as another reason for passing the act, is to be in any degree obviated by forfeiting lands in the situation of this land. It would seem that this desirable purpose could be better promoted by quieting titles as far as may be consistent with the letter and spirit of the laws upon that subject. If the land be entered on the land books and charged with taxes, the commonwealth must resort to the means provided by law for the collection of her dues. If the alleged conveyances be copied into the deed books, any one desiring to purchase the land may inform himself as to the ownership thereof; if such conveyance be duly authenticated, he may perceive that the title is in the alienee; if not duly authenticated, he will know that the title remains in the supposed alienor, unless it can be shown by extrinsic proof that the conveyance was in fact executed.

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In the case before us it appears that better means for giving information to purchasers are furnished than the act of 1835 requires. That act does not require the registry of the deed, but only the entry of the land on the commissioner's books, and assessment of taxes. In this case the deed was registered, even if improperly; the land was in fact entered on the books, and assessed with taxes. The letter and spirit of the act of 1835 and of all other statutes on the subject, are fully complied with in the case before us. The "just

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demands" of the commonwealth on this land have been paid: the ownership thereof may be ascertained by any one wishing to buy and improve it.

The title of Meshach Hyatt was not necessarily bad, although his deed be held to be defectively authenticated. That title, whatever it was, passed to Luke Bryant by the sheriff's deed. This deed was duly recorded and the land duly entered on the commissioner's book as early as 1815: that is, twenty years before the act of 1835, and has been continually so entered ever since; up to 1835 no forfeiture had been created for the omission to enter. The attempt is now made, however, to forfeit the land in the hands of a derivative purchaser, for a delinquency on the part of a remote alienor; for omission of an alleged duty in regard to this land, nearly forty years after he has, in all probability, ceased to have any interest in it. The facts that the land since 1815 has been continually on the books charged with taxes, that it has been held under deeds duly recorded since that time, it is supposed, are of no avail. That the commonwealth has the right to draw in question the validity of each and every link in the chain of title; that the assessment and payment of taxes on a title defectively deduced will not save the forfeiture on account of those very taxes; but that after receipt of her dues the commonwealth may seize the land itself in satisfaction of other and further taxes on the same land due from another person; that is to say, she may receive taxes of the mistaken claimant, and may recover the same taxes of the apparently true owner; that is, she may recover double taxes upon the same land.

If in any case the construction of a statute be doubtful, it is well for the court, in applying the law to the facts, to enquire whether the legislature, having the same facts in its mind, would have placed them under the operation of the law. If we do so in this

case, and shall decide that the land was forfeited, we must hold that the legislature meant to forfeit lands as for an omission to enter and consequent nonpayment of taxes, in a case in which the entry was in fact made and the taxes in fact paid.

It is said that if the defendants below had proved title in Meshach Hyatt, derived from Ignatius Hayden, that then the entry on the land books in his name had been valid and the forfeiture prevented. It is further said Meshach Hyatt was not such owner or proprietor within the meaning of the law as might make such entry. That the chain of title stops with Hayden, and that he alone could make a valid entry; and that having omitted to do so, a forfeiture is incurred. These positions of the plaintiff's lessors, when properly analysed, are found to be, that the commonwealth has a concern in lands above and beyond the taxes charged thereon; that although she may and does receive "her just demands" against any specific parcel of land, yet she may by forfeiture acquire the land itself in addition to her taxes, and this although the tax payer regarding himself as owner, in good faith, has complied with the letter of the law; that she may set up a title in a party who long since attempted to divest himself of all title, who has never since set up any claim; and this for the purpose of forfeiting such title to the prejudice of subsequent claimants who have fully discharged all just demands against the subject; that in every case of devise, descent, lineal or collateral, or of conveyance, if a party not in law entitled to succeed to real property, shall yet in good faith claim title, cause it to be entered and charged with taxes which he duly pays, yet the title of the true owners is forfeited for omission to enter it on the commissioner's books.

In fine, it is insisted, in effect, that the commonwealth is a grand beneficiary to take advantage of all

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mistakes, misconstructions, or imperfections touching titles or the transmission of titles; and this without regard to the fact that her revenue derivable from the subjects of the titles has been fully paid; that the registry laws provided for the security of creditors and purchasers, shall be held to apply to the commonwealth's claim of forfeiture, with only this difference, that in the latter extrinsic proof may be heard to defeat the forfeiture.

I am clearly of opinion that a forfeiture in this case cannot be adjudged to have occurred, without a departure from the letter and spirit of the laws; such judgment could only be sustained by making the statute rigorous and unjust in the last degree. Thus, I am of opinion to reverse the judgment of the Circuit court, and to render judgment for the plaintiffs in error.

Having found enough in the record to sustain a final judgment, I have not deemed it necessary to enquire whether the deeds from Hayden to Gough and from Gough to Hyatt might have been properly admitted to record under the registry laws of 1814, 1819 and 1850, and whether under the decision of this court in *Hassler's lessee v. King*, 9 Gratt. 115, they may be regarded as already recorded, or in a condition to be hereafter recorded. Nor have I deemed it necessary to consider whether the obvious repugnancy of the facts on which the Circuit court rendered judgment should be held sufficient cause of reversal. It is stated as a fact that the boundaries of the land claimed by the plaintiff's lessors are shown by the red lines on the surveyor's plat; yet it is further stated that certain other lines on the plat indicated by certain letters include the land in controversy; and judgment is given for the land so included by the lettered lines. The judgment is thus given for land lying without Miller's grant. If either of the two causes last indicated should be sufficient to reverse the judgment, and no other error existed, the cause

would have to be remanded for a new trial. Finding enough, however, to justify a final judgment without looking to these causes, they become immaterial in this case.

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ALLEN and **MONCURE**, Js. concurred in the opinion of **SAMUELS**, J.

DANIEL and **LEE**, Js. dissented.

JUDGMENT REVERSED.

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OLINGER v. SHEPHERD.

August 21.

1. In a case of forcible entry and detainer pending when the Code of 1849 went into operation, the subsequent proceedings may conform to the provisions of the Code.
2. It seems that under the Code of 1849 a separate complaint is not necessary in a proceeding for an unlawful detainer; that the only complaint necessary is that embodied in the summons.
3. The distinction between an action of ejectment and a proceeding for an unlawful entry and detainer.
4. In a proceeding for an unlawful entry or detainer, if the defendant has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession: And this, though the land from which he is ousted is the land of the commonwealth or of the party who ousted him.
5. The possession to which the proceeding for unlawful entry will apply, is not confined to actual occupancy or enclosure; but it is any possession which is sufficient to sustain an action of trespass. And thus actual possession of a part of a tract of land under a *bona fide* claim and color of title to the whole, is such a possession of the whole or so much thereof as is not in the adverse possession of others, as will sustain this proceeding.
6. A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title to show the bounds of the land claimed by him, and the extent of his possession.

On the 3d of June 1850, John C. Olinger, the plaintiff in error, exhibited his complaint before a justice of the peace of Lee county, that Alfred Shepherd, the defendant in error, had unlawfully turned him out of possession of a certain tenement, containing by estimation two hundred acres of land, with the appurtenances, lying and being in the county aforesaid: whereof he prayed restitution of the possession. A warrant was accordingly issued in the form pre-

scribed by the act of February 12, 1814, 1 Rev. Code, ch. 115, p. 455—459, which was then in force. The warrant was duly executed and returned, an order of survey was made and executed, and the case was continued from time to time until the 18th of October 1852, when the defendant pleaded "not guilty," to which the plaintiff replied generally; and issue was joined thereon. A verdict was found for the plaintiff, and that he recover from the defendant the possession of the premises in the complaint and warrant mentioned; on which a judgment was rendered accordingly.

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On the trial of the cause, the plaintiff offered to give in evidence a deed purporting to be a deed from Alexander W. Mills, as clerk of the County court of Lee county, to John C. Olinger for forty-eight thousand two hundred acres of land in said county; which deed was duly recorded, and recites that a tract of land lying in said county, containing forty-nine thousand two hundred acres, had been returned delinquent in the name of the heirs of Nathaniel Taylor, for the nonpayment of taxes due thereon for the year 1834, which taxes, with the damages thereon, chargeable by law upon the said tract of land, amounted to the sum of four dollars and ninety-two cents; and the said tract having been duly advertised according to law, was offered for sale at public auction for cash, at the October court held for said county, at the courthouse, on the 21st of October 1834, or so much thereof as would be sufficient to discharge the said arrears of taxes and damages, when the said Olinger offered to pay the said sum of four dollars and ninety-two cents for forty-eight thousand and two hundred acres; and no person offering to pay the same for a less quantity of land, it was bid off to the said Olinger; and that the said Olinger had returned to the court a fair plat and certificate of his having the same surveyed and laid off in pursuance of an act of the

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general assembly; which was received by the court and ordered to be recorded. To the introduction of which deed the defendant objected, unless the plaintiff would first give in evidence a plat and certificate of survey made pursuant to the act of the 10th of March 1832, and all other proceedings of record required by the act in accordance with the provisions of which the deed purports to have been made; but the court overruled the objection. Whereupon the defendant further objected to the introduction of the deed: First, because the deed recites that the delinquency of the land thereby conveyed was in the name of Nathaniel Taylor's heirs; whereas the commissioner's books for the county of Lee for the year 1834, introduced by the defendant, show said land to be listed in the name of "Taylor's heirs;" and the delinquent list of the sheriff of said county for said year, and the list of sales of lands delinquent for said year, introduced as aforesaid, show that no delinquency or sale of land occurred, or was made in said year in the name of Nathaniel Taylor's heirs. Secondly, because the deed, in its metes and bounds, varied from the plat and certificate of survey. Thirdly, because it appeared of record that the return of the sheriff of delinquent lands for the year 1834 was made at the October term of the County court for said year, instead of the August or September term thereof, as the law required; and it appearing from the list of sales aforesaid that the sale of the land in the deed mentioned was also made at the October term of the court, it could not have been advertised according to law, as recited in the deed. Fourthly, because the affidavit required by the 17th section of the act of 10th of March 1832 was not attached to the list of sales aforesaid. And fifthly, because the deed upon its face did not state all the particular circumstances of title, as required by the 20th section of the said act. But the court overruled these objections also, and permitted the deed to

be given in evidence to the jury. To which opinions of the court the defendant excepted.

The plaintiff having given in evidence the deed aforesaid, offered no evidence tending to show that Alexander W. Mills was clerk of the said county at the time the deed was executed. A patent to Nathan Fields, Nathaniel Taylor and John Johnston, dated the 30th January 1796, for sixty-two thousand acres of land, was given in evidence by the defendant; and these were the only conveyances of title exhibited in the cause. The plaintiff introduced a witness, whose evidence tended to prove that the forty-eight thousand two hundred acres of land claimed by the plaintiff is a part of the sixty-two thousand acres embraced in the said patent. The defendant gave in evidence a certified printed list of the auditor, made out and deposited in the clerk's office of Lee county, pursuant to the act of 1831, of lands forfeited and vested in the president and directors of the Literary fund, at the sales of 1816, which list embraced a tract of sixty-two thousand acres in the name of Nathan Field's, Nathaniel Taylor and John Johnston. The plaintiff offered no evidence to show that the said tract was redeemed; but showed that forty-nine thousand two hundred acres of land were charged on the commissioner's books in 1834 in the name of Taylor's heirs; that the same was returned delinquent in that year and sold; that the plaintiff took possession of part of the land purchased by him at the time the deed from the clerk was executed, and has continued in possession thereof up to the present time; that the said land was charged to the plaintiff on the books of the commissioner in 1835, and has continued so charged, without delinquency, up to the present time, and that it covers the land in controversy, of which the defendant took possession in the spring of 1850.

The only evidence tending to prove that the plain-

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tiff ever had actual possession of the land in controversy, was that he had actual possession of another portion of the land embraced in his deed, as above stated, and there was also evidence tending to prove that the plaintiff refused to allow Barron, who had paid him for ranging in the adjoining neighborhood the previous year, on land in the plaintiff's deed, to range cattle on the land in controversy for the sum offered by him to the plaintiff, and that Lewis also ranged at the same place Barron did, a different year, by leave of the plaintiff.

The defendant offered in evidence a copy of an entry for two hundred acres of land, and of a survey for one hundred and sixty-five acres of land, dated, the former February 25th, and the latter May 13th, 1850, made by and for him as assignee of William N. G. Barron, by virtue of a Virginia land office treasury warrant, No. 17,954, dated the 26th September 1849; also a receipt of the register of the land office, dated February 27, 1852, for the plat and certificate of the survey aforesaid. A witness testified that the survey made by the plaintiff in this cause embraced one improvement of from twenty-five to twenty-seven years' standing, and another made twenty or twenty-five years ago; one of which was abandoned and vacant when the plaintiff took possession under his deed, and before the sale.

Whereupon the defendant moved the court to give the jury the four following instructions:

1. If they believe from the evidence that the land claimed by the plaintiff is part of the same land patented to Nathan Fields, Nathaniel Taylor, and John Johnston on the 30th day of January 1796 for sixty two thousand acres, and that the title conferred by said patent was forfeited to the president and directors of the Literary fund in 1816, and that neither of said patentees nor any one claiming under them ever re-

deemed said land, then the deed under which the plaintiff claims confers no title, and the jury must find for the defendant.

2. If they believe from the evidence that the land embraced in the deed under which the plaintiff claims was forfeited to the Literary fund in 1816, and has not been since redeemed, or that the proceedings upon which the said deed is founded are irregular, then it confers no color of title upon the plaintiff, and the jury must find for the defendant.

3. If they believe from the evidence that the title to the land embraced in the plaintiff's deed was forfeited to the Literary fund and not redeemed prior to the alleged delinquency thereof in 1834, and that the defendant entered and surveyed the land in controversy in 1850, and returned a plat and certificate thereof into the land office more than six months before the trial of this cause, then they must find for the defendant.

4. If they believe from the evidence that the survey upon which the plaintiff's deed is founded omits to state that it did not embrace improvements, and they believe from the evidence that it did include improvements, then it is insufficient to support the said deed, and they must find for the defendant.

But the court refused to give the said instructions; and instead thereof, instructed them, that if they shall believe from the evidence that the plaintiff purchased the land in controversy under a sale by the sheriff, and received a deed therefor, and took possession of said land under said deed, and held possession thereof more than seven years under said deed and before the defendant entered thereon, then the jury must find for the plaintiff, notwithstanding they might believe the same land was forfeited to the president and directors of the Literary fund in 1816. To which opinion of the court refusing to give the four instructions moved

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for by the defendant, and giving the instruction instead thereof as aforesaid, he also excepted.

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The judgment of the County court was afterwards reversed by the Circuit court of Lee, on a writ of *supersedeas*; whereupon the plaintiff applied to this court for a *supersedeas* to the judgment of the Circuit court, which was awarded.

Baldwin, for the appellant.

B. R. Johnston, for the appellee.

MONCURE, J. after stating the case, proceeded :

The first objection taken to the judgment of the County court is, that the proceeding, having been commenced before the Code took effect, should have been concluded under the law which was then in force, and should not thereafter have conformed, as it did, to the provisions of the Code.

I think the case comes within the exception contained in the Code, ch. 216, § 2, p. 800, and that the proceedings had therein after the Code took effect properly conformed to its provisions. The only difference between the act of February 12, 1814, 1 Rev. Code 455, under which this case was commenced, and the Code, ch. 134, p. 556, under which it was concluded, seems to be in the mode and form of proceeding. Each provides a summary remedy for the same wrong, to wit, a forcible or unlawful entry, or an unlawful detainer. The same evidence which was necessary to sustain the remedy under the old law is necessary to sustain it under the new; except in this, that under the new law the complaint is general, of an unlawful withholding from the plaintiff the premises in question; and may be sustained by evidence of such unlawful withholding, whether the possession was acquired by the defendant forcibly, unlawfully, or lawfully and peaceably; whereas, under the old law,

the complaint was several, of a forcible, or an unlawful entry, or an unlawful detainer: and the subsequent proceedings and the evidence, conformed to the nature of the particular complaint. In all cases, however, whether under the old law or the new, to sustain the complaint it is necessary for the jury in effect to find that at the date of the complaint the defendant unlawfully withheld the possession from the plaintiff, and that he did not so withhold it for three years before. Such was the effect of a special finding for the plaintiff in the form prescribed by the old law, and such is the effect of a general finding for the plaintiff under the new. The complaint under the new law is, "that the defendant is in possession," and as it is said, "unlawfully withholds from the plaintiff the premises in question." The defendant either pleads or makes default; and, in the former case, his plea is "not guilty." Whether he pleads or makes default, a jury is impaneled to try "whether he unlawfully withholds the premises in controversy." If it appears that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, unless it also appears that the defendant has held or detained the possession for three years before the date of the summons, the verdict shall be for the plaintiff, &c. But it is said that the complaint in this case was in the form prescribed by the old law, that the defendant unlawfully turned the plaintiff out of possession; and did not charge, as the complaint under the new law does, that the defendant, at the date or exhibition of the complaint, was in possession and unlawfully withheld from the plaintiff the premises in question; and it is therefore contended that the issue on the plea of not guilty did not involve these facts, and that they were not found by the jury in their verdict for the plaintiff. I think these facts were, in effect, involved in the issue and found by the jury. The complaint

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not only charged that the defendant unlawfully turned the plaintiff out of possession, but prayed restitution of the possession; which implied that the defendant still withheld the possession from the plaintiff. The jury was impaneled to try whether the defendant unlawfully withheld the premises in controversy, which was in effect the issue on the plea of not guilty. The verdict of the jury was for the plaintiff, and "that he recover from the defendant the possession of the premises in the complaint and warrant mentioned. The only effect which the form of the complaint could have had upon the case was to require proof that the possession of the defendant was acquired by an unlawful entry. This objection was not made by the defendant in the County court. On the contrary, if it was erroneous to conform the proceedings which occurred in the case after the Code took effect, to the provisions thereof, he committed the first error by pleading "not guilty."

Before I leave this branch of the subject, it may be proper to say, by way of explanation, that I do not consider a separate complaint to be now necessary, but the only complaint which the present law seems to contemplate, is embodied in the summons.

The other objections taken to the judgment of the County court are to the admission of the deed mentioned in the first bill of exceptions as evidence to the jury; and to the giving and refusing instructions, as mentioned in the second bill of exceptions.

This case seems to have been treated, both in the County and Circuit courts, as an action of ejectment, instead of an action of unlawful entry; and to that cause the supposed errors which have arisen in the case are justly attributable.

There is a material difference between an action of ejectment and an action of forcible or unlawful entry. The title or right of possession is always in-

volved in the trial of an action of ejectment. The plaintiff cannot recover without showing that he is entitled to the possession; and the defendant, without having any right to the possession himself, may generally prevent a recovery by the plaintiff, by showing an outstanding right of possession in another. The remedy for a forcible or unlawful entry was designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If the defendant enters unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession. His actual possession, of itself, gives him a right of possession against any person not having a right of entry. That the land belongs to the commonwealth will make no difference. There can, it is true, be no adversary possession against the commonwealth. But a person may be in actual possession of the land of the commonwealth, and will be entitled to all the remedies which the law provides for the protection of the actual possession against tortfeasors. Any possession is a legal possession against a wrongdoer. *Graham v. Peat*, 1 East 244; *Harker v. Berkebeck*, 3 Bur. 1556. Proof of an actual and exclusive possession by the plaintiff, even if it be by wrong, is sufficient to support the action of trespass against a mere stranger or wrongdoer, who has neither title to the possession himself nor authority from the legal owner. 2 Greenl. Ev. § 618. In a case reported in 4 Leon. 184, and Godb. 133, it appears that Anderson, C. J. said, "If one intrude upon the possession of the king, and another man entereth upon him, he shall not have an action of trespass for that entry; for that he who is to have and maintain trespass ought to have a possession. But in such case he hath not a

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possession, for every intruder shall answer to the king for his whole time, and every intrusion supposeth the possession to be in the king." But it was decided in the subsequent case of *Johnson v. Barret*, Aleyn's R. 10, that an intruder upon the king's possession might have an action of trespass against a stranger. And the same principle is stated in 7 Com. Dig. Trespass, b. 2, p. 510, marg. 493, where the case reported by Aleyn is referred to, but not the previous case reported by Leon. and Godb. The weight of authority seems therefore to be in favor of the principle as laid down in Com. See also *Cutts v. Spring*, 15 Mass. R. 135; and *Inhab. Barnstable v. Thacker*, 3 Metc. R. 239.

If a person in possession of public land may maintain trespass against a stranger, *a fortiori* he may maintain forcible or unlawful entry against him. Forceable entry may be maintained where trespass cannot; as for instance, against the owner of the land; who may defend himself against an action of trespass by the plea of *liberum tenementum*. *Hyatt v. Wood*, 4 John. R. 950. The owner of the land, having a right of entry, will not commit a trespass by entering, though with force, unless he also commit a breach of the peace. The law will not give damages against him in an action of trespass *quare clausum fregit*, but will compel him to restore the possession in an action of forceable entry. That the defendant, in an action of forceable entry, cannot defend himself by showing that the land in controversy is a part of the public domain, has been decided in Alabama, *Cunningham v. Green*, 3 Alab. R. 127, and in Tennessee, *Pettyjohn v. Akers*, 6 Yerg. R. 448; and I am not aware that the contrary has been decided any where. I can see no reason for a different rule in regard to public and private lands. There is the same reason for the protection of the actual possession against unlawful invasion in both cases. The plaintiff in the action is not suing for

damages, but to have the possession restored to him; and when he shows that he has been turned out of possession forcibly, or by one having no right to do so, he has made out his right to restitution, which cannot be defeated by any evidence in regard to the title or right of possession. The judgment has only the effect of placing the parties *in statu quo*. It settles nothing, even between them, in regard to the title or right of possession: it being declared by law that "No such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such verdict be conclusive, in any such future action, of the facts therein found." Code, p. 557, § 4.

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But what is the nature of the possession to which this summary remedy applies? It is certainly not confined to a possession by actual occupancy or enclosure. I think it applies to any possession which is sufficient to sustain an action of trespass. Title draws after it possession of property not in the adverse possession of another. Actual possession of part of a tract of land under a *bona fide* claim and color of title to the whole, is possession of the whole, or so much thereof as is not in the adverse possession of others. This is the general principle, and it applies to the remedy in question. It has been decided in Kentucky that actual residence on one part of a tract, claiming the whole, is a possession of the unenclosed part, within the meaning of the act against forcible entries. *Vanhorne v. Tilley*, 1 Monr. R. 50. If this be a sound principle of law, as I doubt not it is, it applies to the land of the commonwealth as against persons not lawfully claiming under her. See *Cunningham v. Green*, 3 Alab. 127. Of course her rights cannot be affected by any kind of possession of her land.

Applying these principles to this case, there can be no doubt of the plaintiff's right to recover, if the facts were according to the respective pretensions of the

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parties. The plaintiff being in the actual possession of a part of a large tract of land, claiming the whole under a deed conveying it to him by metes and bounds, and having continued in such possession for more than fifteen years, paying taxes on the whole tract, and which during all that time was charged to him on the books of the commissioner, the defendant, within three years before the institution of the suit, entered and took possession of a part of the land not in the actual occupancy of the plaintiff, claiming it under an entry and survey made for the purpose of obtaining a patent, upon the ground not that it was waste and unappropriated land, but that it was part of a large tract of land which had become vested in the president and directors of the Literary fund, under the act of 1814, 2 Rev. Code, p. 550, § 30. We have seen that possession of part of a tract of land, under claim and color of title to the whole, is possession of the whole, and that this principle applies to the land of the commonwealth as against persons not lawfully claiming under her. The defendant claims under her, but not lawfully; the land not being waste and unappropriated, and therefore not liable to entry, survey and patent, even though the title be vested in the president and directors of the Literary fund. It is unnecessary to enquire what would have been the relative rights of the parties if the defendant had obtained a patent for the land in controversy before the institution of this suit. The land not being patentable, he was a mere trespasser in making the entry and survey, and is bound to restore the possession to the plaintiff from whom it was unlawfully taken.

The case, then, on its merits, seems clearly to be with the plaintiff, who is entitled to have the judgment of the County court in his favor affirmed, unless there be some error in the rulings of that court, which requires its reversal. The case, as before observed,

was treated in that court, as well as the Circuit court, as an action of ejectment, and the questions raised and decided were appropriate to that rather than an action of unlawful entry. Still I think there are no errors in the judgment of the County court to the prejudice of the defendant.

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Those questions arise on the two bills of exceptions taken in the case. That arising on the first is as to the admissibility of the deed. There can be no doubt about the admissibility of the deed as evidence, if the facts stated in the second bill of exceptions be referred to; as they clearly show that the deed was admissible as color of title, and for the purpose of showing the metes and bounds of the tract claimed by the plaintiff under the deed, and of part of which he took actual possession. The general rule certainly is, that facts stated in one bill of exceptions cannot be noticed by an appellate court in considering another. 1 Rob. Pr. 347. There may be exceptions to this rule where the reasons on which it rests do not apply. *Perkins' adm'r v. Hawkins' qdm'x*, 9 Gratt. 649. The second bill of exceptions showing that the deed was clearly admissible, and that no additional evidence could have rendered it inadmissible, it would seem to be vain to reverse the judgment for the supposed error in admitting it before other evidence was offered which rendered it admissible. But without deciding whether this is an exception to the general rule before mentioned, and without looking to the facts stated in the second bill of exceptions, I think the deed was admissible evidence. It is a link, and it seems to me a necessary link, in the chain of the plaintiff's evidence. One of the questions necessarily involved in the case is, whether the plaintiff was in possession of the land when the wrong complained of by him was committed? A man can rarely be in the actual occupancy of every foot of his land. His possession of part of

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it is generally constructive, and results from his actual occupancy of another part, under claim and color of title to the whole. The deed under which he enters and claims is then a necessary part of his evidence to show the metes and bounds of his possession. It cannot therefore be said, when he offers the deed in evidence, that it is irrelevant and inadmissible. If no evidence be offered to support the deed, and prove that possession was taken under it of the land thereby conveyed, or some part thereof, the plaintiff's chain of evidence may be incomplete, and may be objected to on that ground, but not on the ground that the deed was not a proper link in the chain. The deed being a proper link in the chain of evidence, it will be presumed in favor of the judgment that the other necessary links were supplied before, at the time, or after the deed was offered. *Flannagan v. Grimmel*, 10 Gratt. 421. Specific objections were made to it, which, if well founded, affected its validity as a transfer of title; but whether well founded or not, left it still admissible evidence of the metes and bounds of the land in controversy, and of the extent of the plaintiff's possession. The motion was not to exclude the deed only as evidence of a valid transfer of title, but to exclude it altogether; and was therefore properly overruled, if the deed was admissible for any purpose.

The questions arising on the second bill of exceptions are, as to the instructions refused and given by the court. I think the four instructions moved for by the defendant were properly refused by the court. The first was properly refused, because even if the deed conferred no title, it did not follow that the jury should find for the defendant. The plaintiff, even if he had no title, had a right to recover if he was unlawfully dispossessed by the defendant within three years before the institution of the suit. The second was pro-

perly refused, because, notwithstanding the facts supposed in that instruction, the deed gave color of title to the plaintiff; and whether it did or not, he had a right to recover, if he was unlawfully dispossessed by the defendant as aforesaid. The third was properly refused, because the land in controversy not being waste and unappropriated, and therefore not liable to entry, survey and patent, the defendant's entry was unlawful, and the plaintiff was entitled to recover possession in this suit, notwithstanding the defendant may have entered and surveyed the land in 1850, and returned a plat and certificate thereof into the land office more than six months before the trial of the suit. The fourth was properly refused, for the same reasons which made it proper to refuse the first and second. I do not admit, however, that it was necessary to state in the survey on which the plaintiff's deed was founded, whether or not any improvements were included on the land, nor that in the absence of such a statement, evidence *dehors* the proceedings would be admissible to show the existence of such improvements. On that subject I express no opinion, it being unnecessary to do so.

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I am also of opinion, that there is no error in the instruction which was given by the court; at least none to the prejudice of the defendant. This instruction, like the rest, regarded the case as an action of ejectment, and is wholly inappropriate to an action of unlawful entry. Whether the proposition therein asserted would be correct or not in an action of ejectment, it does not seem to be untrue, though irrelevant and unnecessary, in an action of unlawful entry. If, as we have seen, the plaintiff would be entitled to recover in this action on the facts supposed in the instruction, without regard to the length of his possession, *a fortiori* he would be so entitled if he continued to hold possession more than seven years before the defendant's entry.

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In regard to all the questions arising upon the two bills of exceptions in this case, I refer to what is said by Judge LEE in *Kincheloe v. Tracewells*, 11 Gratt. 587, 608-9, which seems to be as applicable to this case as that. I also refer to the opinion of Judge DANIEL in *Tappscott v. Cobbs*, 11 Gratt. 172, as having a material bearing upon some of the questions arising in this case, even in their application to an action of ejectment.

I am for reversing the judgment of the Circuit court and affirming that of the County court.

SAMUELS and LEE, Js. concurred in the opinion of MONCURE, J.

ALLEN, P. and DANIEL, J. dissented.

Judgment of the Circuit court reversed; and that of the County court affirmed.

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HUGHES & wife v. JOHNSTON.

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(Absent DANIEL and SAMUELS, Js.)

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August 22.

1. If an appeal from an interlocutory order or decree is allowed, and the Court of appeals is of opinion that it should have been proceeded in further before the appeal was allowed, it will be dismissed as improvidently awarded.
2. A bill is filed in 1836 by an executor and guardian, charging that the personal estate of his testator is not sufficient to pay his debts; and that it is for the interest of the infants to sell their land; and that he had made a contract for the sale of the land which he deemed highly beneficial to the infants. The bill is not sworn to; nor does it appear that the testimony was taken in the presence of the guardian *ad litem*, or upon interrogatories agreed to by him. In the same year a decree is made confirming the sale, and authorizing and directing the executor as commissioner to convey the land upon the payment or securing of the purchase money; and directing him to report to the court. The cause is continued regularly until 1845, when, on the motion of the plaintiff, an order is made for the settlement of the guardian's accounts: And then the cause is continued until January 1853, when the death of one of the infants and the marriage of the other is suggested: And the husband and wife obtain an appeal from the decree of 1836. HELD:
 1. The appeal was improvidently allowed, and should be dismissed.
 2. The cause should be sent back, and the plaintiff required to amend his bill and make the purchaser and those claiming under him, parties. He should be allowed to make the affidavit prescribed by § 16, of the act, 1 Rev. Code 405, concerning guardians, and to show, if he can, that the evidence was properly taken; and both parties should be allowed to introduce further evidence. And if upon taking the proper accounts, and the evidence introduced, it shall appear that the sale was necessary under the facts existing at the time, and was fairly made, and for a full price, the same is not to be set aside on account of the irregularities in the proceedings.

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In May 1833 John H. Fulton and Beverley R. Johnston, executors of Charles C. Johnston deceased, and guardians of his two infant children, filed their bill in the Circuit court of Washington county against the said infants, to have a sale of a tract of land descended to them from their father. In their bill they state that there was a considerable sum due for the purchase money of the land; that the personal estate of their testator was not sufficient to pay his debts, and that it was for the interest of the infants that the land should be sold. That so believing, they had made a contract for the sale of the land to Robert Beattie at the price of seven thousand dollars, which they considered highly advantageous to the infants; and they ask that the said sale may be confirmed. This bill was not sworn to by the plaintiffs.

At the same term of the court a guardian *ad litem* was appointed for the infants, to defend them in the suit; and he answered, submitting their rights to the protection of the court. Afterwards the bill was amended, making the heirs of the infants parties defendants.

Depositions were taken by the plaintiffs in relation to the condition of the land, and to show that it was for the interest of the infants that it should be sold: but it does not appear that these witnesses were examined in the presence of the guardian *ad litem*, or upon interrogatories agreed upon by the plaintiffs and the guardian.

In June 1836 the cause came on to be heard, when the court, upon the personal knowledge of the judge of the tract of land, as well as the matters contained in the record, being satisfied that the sale made to Beattie was judicious and highly beneficial to the infant defendants, decreed that said sale be confirmed: And Beverley R. Johnston, who was appointed a commissioner for the purpose, was directed, upon the pay-

ment of the purchase money, or upon its being secured by a lien upon the land, to convey the same to the said Beattie, with special warranty; and to report his proceedings to the court.

From this time the cause was regularly continued until October 1845, when, on the motion of the plaintiffs, a commissioner was directed to state their accounts as guardians of the infant defendants, and report the same to the court. And then the cause was continued until January 1853, when the death of one of the infant defendants, and the marriage of the other to Robert W. Hughes, was suggested, and the suit was revived in the name of Johnston, the surviving executor and guardian, against Hughes and wife; who thereupon applied to this court for an appeal from the decree of May 1836; which was allowed.

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J. W. Sheffey and Patton, for the appellants.
Stuart and Baldwin, for the appellee.

ALLEN, P. delivered the opinion of the court:

The court is of opinion, that as by the Code, p. 684, ch. 182, § 10, it is provided, that "the petition shall be rejected, when it is for an appeal from an interlocutory decree or order in a case, which the court or judge to whom it is presented deems it most proper should be proceeded in further in the court below before an appeal is allowed therein," it is equally competent for the appellate court after an appeal has been allowed, to dismiss the same as having been improvidently granted and remand the case, if it deems the case to be one in which justice to all interested, makes it proper that it should be proceeded in farther in the court below, before concluding the rights of the parties interested in the decree, by reversing or affirming the same.

And it appearing that the interlocutory decree com-

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plained of in this case was rendered on the 1st of June 1836, whereby a contract of sale in the bill and proceedings set out, as having been theretofore made with Colonel Robert Beattie was confirmed, and a conveyance of the land sold was directed to be made by a commissioner to said Beattie, upon the purchase money being paid or secured; that since then no proceedings besides continuances have been taken in the cause, except an order directing a settlement of the guardian account, made at the October term 1845, and an entry made in the year 1853, suggesting the death of one of the heirs of Charles C. Johnston, the marriage of the other, and a revivor of the cause against the surviving executor and guardian; the court is of opinion that it could not act upon the appeal after such a lapse of time, and in the present condition of the record, without the hazard of injustice.

The purchaser is no party to the record; it does not appear whether he acquiesced in said interlocutory decree confirming his contract for the purchase of the land; and if he has acquiesced, whether he has paid the purchase money, or received a conveyance. If the purchase has been completed, he has an interest in the decree, which should not be disturbed until he has been made a party and had an opportunity of being heard in support thereof.

The court is further of opinion, that in the present condition of the record it would be unjust to the appellee to express any opinion upon the alleged errors in said interlocutory decree. The propriety of the sale must be determined by ascertaining the condition of the estate at the time when the sale was made. If the sale was necessary under the facts then existing, and was fairly made for a full price, it does not follow that mere irregularities in the proceedings, if any such occurred, would make it necessary to set the same aside upon a final hearing. But whether such sale

was proper or not cannot be correctly determined until an account of the liabilities and assets of the estate is taken: And the executorial and guardian accounts should be settled, and an enquiry made as to the payment of the purchase money of said land and the application thereof, before any final decree is pronounced.

To bring all these matters properly before the court for adjudication, the appellee should be required to amend his bill and make the said Robert Beattie, the purchaser of said land, and those claiming under him, if any, parties defendants; proper accounts should be ordered and taken; leave should be given to the appellee to file the affidavit prescribed by the 16th section of the act of 1819, 1 Rev. Code, p. 405, concerning guardians; and to show if he can that the depositions of the witnesses filed had been taken in presence of the guardian *ad litem*, or upon interrogatories agreed upon by him; and leave should be given to both parties to take further testimony, so as to enable the court upon a final hearing, to decide the cause with all the parties in interest before it, and in view of all the circumstances entitled to consideration.

It is therefore adjudged, ordered and decreed, that the appeal be dismissed as improvidently granted, with costs to the appellee, and that the cause be remanded to be proceeded in farther in the mode above indicated, in order to a final decree.

APPEAL DISMISSED.

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UNIS & als v. CHARLTON'S adm'r & als.—Four Cases.

August 24.

1. A deposition is taken by a plaintiff in another state, to be read as evidence in a cause depending here; and the justices certify that the defendants appeared by counsel and cross-examined the witness: And the deposition shows that counsel professing to represent the defendants, did appear and cross-examine the witness. It does not appear, however, that the deposition was taken under a commission, or that the court here had ever authorized a commission to issue; nor was any notice to the defendant produced or proved. The deposition is taken without authority; and the justices having no authority to take the deposition, their certificate is no proof of any fact it states.
2. A deposition having been taken without authority or notice, is not admissible as evidence; and the objection to it may be taken when it is offered to be read as evidence to the jury.
3. In a suit by persons held as slaves, for their freedom, on the ground that their ancestress had been brought into the state without the oath then required by the statute having been taken by her master, her declaration that she was free in the state from whence she was brought, and request to the witness to write to that state to get information on the subject, it not appearing that such declarations or request was made within twenty years after she was brought into the state, are not competent evidence to rebut the presumption arising from lapse of time, that the oath was taken by the master.
4. Nor in such case is it competent to prove the character of the master holding her in the state, to account for her failure to assert her freedom.
5. In four suits for freedom, the plaintiffs in all of which claim as the descendants of one woman, who they allege was free, and the defendants in all of which claim under C, who the plaintiffs insist purchased their ancestress from S, the man who brought her into the state, with a general warranty of title, and whose administrator is a defendant in one of the suits, the cases are tried together, and it is agreed by the counsel that the depositions taken in one case shall be read in all; the defendants offer in evidence the deposition of S, and with it they offer a release from the administrator of C to S, of all right of recovery upon the warranty of title. HELD: The

release of the administrator is sufficient to restore the competency of S, and if it does not apply to all the plaintiffs in the other suits, still under the agreement of counsel, the deposition is admissible as evidence on the trial.

6. The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility by the proof of statements made by him at another time, inconsistent with, or contradictory of, the statement in his deposition, before the foundation for the introduction of such impeaching testimony is first laid by an examination of the witness touching the fact of his having made such statements.
7. A deposition taken at so late a day that the other party cannot attend at the time and place of taking it, and then get to the court, where the cause in which it is taken is to be tried, by the commencement of the term, is not admissible in evidence.

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These cases were before this court in 1847, and are reported in 4 Gratt. 58. They were four actions for freedom brought in 1826, in the Circuit court of Montgomery county. All the paupers were descendants of a woman named Flora, who, they alleged, was a free-woman in Connecticut, and abducted from thence with her two infant children; and that they had been brought into Virginia, without the oath being taken by the claimant of them which was then required by the statute. The defendant in one of the cases was the administrator of James Charlton; and the other defendants claimed under Charlton, from whom they derived those of the paupers who were in their possession.

There were many trials of the cases; and they were removed to the Circuit court of the county of Rockbridge, from whence the former appeals were taken. After the cases were sent back they were returned to the Circuit court of Montgomery county; and came on for trial there in June 1853: By consent they were all tried together. Upon the trial the plaintiffs offered in evidence the deposition of Shubal Stiles, taken in June 1845, before two justices of the peace for the

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county of Hartford in the state of Connecticut. The deposition showed that W. Hartwell, professing to act as counsel for the defendants, appeared and cross-examined the witness; and the justices certify that the defendants appeared by their counsel at the time and place of taking said deposition.

To the introduction of the deposition as evidence, the defendants objected, upon the ground that no notice of the time and place of taking it had been given; and also upon the ground that no commission had been awarded to authorize the justices to take it. No notice or commission was produced, nor did the record show that a commission had been awarded; and the certificate of the justices did not state that it was taken by virtue of a commission: These objections were not endorsed on the deposition. The court sustained the objection, and excluded the evidence; and the plaintiffs excepted.

The plaintiffs also offered in evidence the deposition of Henry Carty. In answer to questions put to him by plaintiffs' counsel, he said that old Flora, the ancestress of the plaintiffs, had told him at different times that if she had her just rights she would be a free-woman; and she at the same time wanted him to write her a letter to send back where she came from, to obtain information from the people concerning her freedom. That Squire Howard, who is dead, told the witness that Flora had applied to him as a magistrate concerning her freedom. And that James Charlton was a man of severe temper, and likely to keep his slaves in subjection.

The plaintiffs offered this testimony to rebut the presumption arising from lapse of time, that James Stephens, who, defendants alleged, brought Flora and her children into the state, had taken the oath prescribed by the act of 1778. But the defendants objected to so much of the deposition as is above given, and the

court sustained the objection; and certified that it did not appear when the declarations of Flora were made; but that it did appear that her application to the justice Howard was not made within twenty years after she was brought to Virginia. And it further appeared, from the petition filed by the plaintiffs, that they did not rely upon this ground as entitling them to freedom, when they instituted their suits. To this opinion of the court the plaintiffs again excepted.

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All the testimony offered on the trial of these causes was in the form of depositions; and after the plaintiffs had read the depositions of several witnesses, for the purpose of proving that Flora and her two children had been brought from New York to Virginia by a certain James Simpkins; and that they had been sold by Simpkins to James Charlton, with a general warranty of title; the defendants offered in evidence the deposition of Simpkins, which was objected to by the plaintiffs on the ground that the witness was interested in the result of the suits. To obviate this objection, the defendant produced certain releases, whereby John McC. Taylor, the administrator of James Charlton, released to Simpkins all right of recovery which might in any way accrue to him as administrator as aforesaid, against the said Simpkins, in case the plaintiffs in the action against himself or in any of the other actions should recover their freedom. There were also releases from a number of the heirs of James Charlton. These releases bore date prior to the taking of the deposition. The plaintiffs objected that these releases were insufficient to restore the competency of the witness, as they did not release as to all the defendants, and because the release executed by Taylor was an insufficient release. But the causes were all tried together, and it was agreed by the counsel on both sides that the evidence taken in one case should be read in all. The court therefore overruled the objection, and admitted the evidence; and the plaintiffs again excepted.

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After the deposition of Simpkins had been read, the plaintiffs offered evidence to prove that he had made statements inconsistent with his deposition. The defendants objected to this evidence, and the said statements not having been made on oath, and no foundation having been laid for their introduction, the court sustained the objection, and excluded the evidence: And the plaintiffs again excepted.

The plaintiffs further offered in evidence the deposition of Robert Gardner. This deposition was taken on Thursday, the 11th of April 1850, at his house in the town of Christianburg, in the county of Montgomery. At that time these actions were pending in the Circuit court of Rockbridge county; and the term of that court commenced on the 12th of April. The distance from the residence of the defendants to Lexington, where the court was held, is about ninety miles, and Taylor, one of the defendants, attended the court at that term. The notice for taking the deposition was served on one of the defendants on the 8th, on another on the 9th, and on another on the 10th of April. The defendants objected to the evidence on the ground that the notice was not reasonable; and the court sustained the objection: And the plaintiffs again excepted.

There were verdicts and judgments in all the cases for the defendants: Whereupon the plaintiffs applied to this court for *superscdeases*, which were allowed.

Hoge, for the appellants, insisted:

1st. That the objection to Stiles' deposition should not have been sustained: That the objection was not taken before the jury were sworn, and could not be taken afterwards. And he insisted further, that the appearance of the counsel for the defendants and the cross-examination of the witness by him, dispensed with the necessity of producing the commission and notice. He referred to *Jones v. Lucas*, 1 Rand. 268; 2 Dan. Ch. Pr. 1122.

2d. That the evidence as to the statement and acts of Flora should have been admitted; that it was for the jury to decide whether these statements were made within twenty years from the time she was brought into Virginia. *Abraham v. Mathews*, 6 Munf. 159; *Kheel v. Herbert*, 1 Wash. 203; *Ross v. Gill*, Id. 87.

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3d. That Simpkins was interested, and his testimony should have been excluded. *Woodward v. Woodson*, 6 Munf. 227; 1 Greenl. Evi. 501, 502. That the releases were not by all the parties interested; and moreover, though they were dated prior to the taking of the deposition, yet they were not proved until the trial, when they were produced by the defendants. He referred to 1 Philips' Evi. 160; *Manderille v. Perry*, 6 Call 78; *Rowt v. Kile*, Gilm. 202; *Temple v. Ellett*, 2 Munf. 452; *Wilcox v. Pierman*, 9 Leigh, 144; *Tur-
berville v. Self*, 4 Call 580; *Richie v. Moore*, 5 Munf. 388. That a release from the administrator was not sufficient, 1 Rev. Code of 1819, p. 387, 432, the administrator not having any interest in the slaves except for the payment of debts. He referred to *Rosser v. Depriest*, 5 Gratt. 6; *Fisher v. Bassett*, 9 Leigh 119; 1 Story's Equ. Jur. 23, 24, 25; *Knight v. Yarborough*, 4 Rand. 566. That the agreement to admit the evidence in all the causes, did not authorize the admission of illegal evidence in one cause, because it was legal in another. Chitty on Contr. 74, 76; Story on Contr. § 634, 635, 636.

4th. That the evidence of the statements of Simpkins was admissible to impeach his credit. *Charlton's adm'r v. Unis*, 4 Gratt. 58.

Baldwin and Patton, for the appellees, insisted:

1st. That the want of a notice and commission was conclusive against the admission of Stiles' deposition: That the appearance of counsel for the defendants did not cure this defect. *Blincoe v. Berkely*, 1 Call 405.

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But that there was no evidence of such an appearance, or even that the deposition was taken; for the justices had no authority without a commission, and their certificate thereof in the absence of a commission proved nothing. *Gillespie v. Gillespie*, 2 Bibb's R. 90; *Taylor v. Whiting*, 4 Mour. R. 364; *Clarke v. Goode*, 6 J. J. Marsh. R. 637. That the objection was taken at the proper time, and it was not such an objection as was required to be taken before the jury was sworn.

2d. That the statements of the woman Flora were not proper evidence for the purpose proposed. That after twenty years it will be presumed the oath was taken. *Abraham v. Mathews*, 6 Munf. 159; *McMichen v. Amos*, 4 Rand. 134; *George v. Parker*, Id. 659; *Betty v. Horton*, 5 Leigh 615. That the statement had no relation to the oath, but to her having been free in Connecticut. That moreover the claim spoken of by the statute is a judicial assertion of the claim; and such as it was, it was after she had been here twenty years.

3d. That the causes were all tried together, and the true construction of the agreement of the counsel is, that if the evidence was legal in one case, it should be admissible in all. But if this was not so, the release of the administrator of Charlton, who alone could sue upon the warranty of Simpkins, was sufficient to render him a competent witness. 1 Lomax on Ex'ors 286, § 4; 287, § 9; *Hays v. Hays*, 5 Munf. 418.

4th. On the fourth point made by the counsel for the appellants, they referred to 1 Greenl. Evi. § 462; 2 Philips' Evi. 432.

5th. As to the notice to take the deposition of Gardner, they referred to *Stubbs v. Burwell*, 2 Hen. & Munf. 536; *Winsookie Turnpike Co. v. Ridley*, 8 Verm. R. 404; *Waters v. Harrison*, 4 Bibb's R. 87; *Rennick v. Willoughby*, 2 A. K. Marsh. R. 20; 2 U. S. Dig. 219.

DANIEL, J. Proceeding to consider the causes of error in the order in which they are assigned in the petition, it seems to me that there is no just exception to the action of the Circuit court in excluding the deposition of the witness Stiles. It appears from the bill of exceptions, that no commission for taking the deposition, no notice of the time and place of taking it, was produced; the record did not show that a commission had been awarded, and the justices in their certificate do not state that they took the deposition by virtue of a commission. There was thus an absence of all proof to show that the plaintiffs had complied with the conditions on the performance of which their right to read the deposition depended. The failure to object to the deposition on this score, before it was offered on the trial, was no waiver of the objection. It was for the plaintiffs to show either an observance of the requirements of the statute under which they claimed a right to read the deposition, or that the defendants had waived or dispensed with it. Whether an appearance of the defendants by counsel, at the time and place of taking the deposition, might have been taken as the evidence of such waiver, is a question which cannot be raised. The only evidence of such appearance is in the certificate of the justices: And as it does not appear that they acted under a commission, they had no warrant or authority to speak in the matter; and their certificate is without force or virtue as proof in the cause.

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No ground is laid on which to raise the question which the plaintiffs seek to present by the second cause of error assigned. In the fourth section of the act of 1778, for preventing the importation of slaves, 9 Hen. St. at Large 471, an exception is made in favor of persons removing from any other of the United States into this; provided that within a certain period after their removal they take an oath to the effect that

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their removal into the state is not made with an intention to evade the provisions of the act, and that they have not brought their slaves with an intention of selling them. And by repeated adjudications of this court, (as in *Abraham v. Mathews*, 6 Munf. 159, *George v. Parker*, 4 Rand. 659,) made in cases arising under acts containing like provisions, it has been settled that twenty years' possession, by the master, of slaves thus brought into the state, without any claim of freedom on the part of the slaves, justifies the presumption that the master had duly taken the oath required by law. How such a claim should be asserted in order to have the effect of repelling this presumption, has never been decided by this court, and does not arise for consideration now. It is obvious, however, that no matter what may be the essentials of such a claim, or how it must be asserted, it can be of no avail unless made within the twenty years before the presumption has matured. It appears from Carter's statement that Charlton had purchased Flora, the ancestress of the plaintiffs, at least forty-five years before the date of his deposition; and he no where fixes the date of the loose declarations of Flora, that "if she had her just rights, she would be a freewoman." These delarations, from aught that appears to the contrary, may have been made long after the presumption had attached; and were therefore plainly inadmissible as testimony for any purpose. The opinion of the witness in respect to the temper and character of Charlton as a master, was, I think, equally inadmissible. If such testimony could be resorted to as furnishing a reason or argument why the presumption should not be allowed, it would be equally proper to go into proofs of the character of the slaves, as whether remarkable for timidity or otherwise. Such proofs, it is manifest, would rather serve to dissipate the attention of the jury, and to invite them into the indulgence of loose surmise and conjecture, than to

guide them to those results which it is the aim and tendency of legitimate testimony to establish. The exception to the testimony was, I think, properly sustained by the court.

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I cannot perceive any force in the objection to the releases executed to the witness Simpkins, on the score that they were not executed by all of the defendants. No good reason is suggested why such a release should be made by any one but Taylor, the personal representative of Charlton. No suit could be maintained against Simpkins for a breach of the warranty, whether express or implied, of the title to the plaintiffs as slaves, by any one but Charlton's representative, and the release of all right of recovery by him divested the witness of all interest in the controversy, in respect to all of the plaintiffs embraced in the release.

The further objection made to the releases, that they do not extend to all the plaintiffs in each of the suits, is met by the statement of the judge in the bill of exceptions, that "it was agreed by the counsel on both sides that the evidence taken in one case should be read in all." The terms of this agreement, it is obvious, are fully satisfied when it is shown that the deposition would have been legal evidence in any one of the cases: And as it is conceded that the releases embrace all of the plaintiffs in one of the suits, I see no reason why the agreement should not be allowed to cure the omission in the releases. The convenience of both sides was no doubt promoted by the agreement. The plaintiffs in each of the suits were all descended from one common ancestress; the testimony in respect to the claim of one was equally applicable to the claim of each; and it is difficult to conceive of injury resulting to the rights of any of them from the court's enforcing the agreement according to its terms. The third ground of error is, therefore, I think, untenable.

The fourth assignment of error raises a question

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which, it is somewhat remarkable, has never before been distinctly presented to this court for its decision, to wit, whether a witness who has testified in a cause may be impeached by the proof of contradictory or inconsistent statements, alleged to have been made by him on other occasions, before the foundation for the introduction of such impeaching testimony is first laid, by an examination of the witness touching the fact of his having made such statements. In the *Queen's Case*, 2 Brod. & Bing. 292, 6 Eng. C. L. R. 121, the question, so far as it relates to examinations in courts, was very fully discussed, and was decided in the negative by the unanimous opinion of the judges. This case occurred in 1820. The rule there stated has been adhered to in numerous cases since decided, and may now be regarded as firmly established in England. In some of the United States the courts have refused to adopt the rule; but I am satisfied, as well from an examination of such of the reports as are to be found in our library, as from a statement of Mr. Greenleaf in a note to his Treatise on the Law of Evidence, p. 579, that the rule has obtained in a large majority of the states of our Union.

In the case of *Downer v. Dana*, 19 Verm. R. 338, a distinction is taken between the case of a witness examined in court and one who has given his testimony in the form of a deposition. In that case the court sanctions, and expresses a determination to adhere to, the rule, that testimony, as to the previous declarations of a witness produced upon the stand, offered for the purpose of impeaching him, is not to be received, unless an opportunity be first afforded him to explain or qualify the imputed declaration. But it still decides that the rule has no application to testimony in the shape of depositions, whether taken with or without notice, and whether the adverse party attended at the taking or not, and that the adverse party

may in such case, without previous enquiry, prove any inconsistent declarations or conduct of the witness.

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After a careful examination of the opinion in which this distinction is taken, I have been unable to perceive the force of the reasoning on which it is made to rest. The principal reason assigned by the learned judge who delivered the opinion of the court, for refusing to apply the rule to depositions, is, that such a practice would impose on a party, wishing the privilege of impeachment, the necessity of attending in person or by attorney at the taking of every deposition to be used against him, within or without the state, which, on any other account, he might not be disposed to do. This argument *ab inconvenienti* is not wholly without show of reason when urged in behalf of the exercise of the privilege of impeachment by a party who has had no notice of the taking, or who, though notified, did not attend at the taking of a deposition which he seeks to discredit, but seems to me devoid of weight when extended to the case of a party who was present at the taking of the deposition, and had thus the same opportunity of cross-examining the witness, and calling his attention to the imputed inconsistent statements, that he would or might have had, in case the witness had been examined in court.

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I have seen no other case in which this distinction has been taken, whilst in a number of cases decided by the courts of New York, Tennessee, Alabama and Mississippi, the rule has been held applicable as well to depositions as to the oral examinations of witnesses on the stand. *Kimball v. Davis*, 19 Wend. R. 437; Same Case, affirmed in the Court of Errors, 25 Wend. R. 259; *Story v. Saunders*, 8 Hump. R. 663; *Richmond v. Richmond*, 10 Yerg. R. 343; *Howell v. Reynolds*, 12 Alab. R. 128; *Sawyer v. Sawyer*, Walk. Ch. R. 48. And in the case of *Conrad v. Guffey*, 16 How.

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Sup. Ct. R. 38, recently decided by the Supreme court of the United States, the authorities are fully examined and reviewed in the arguments of counsel and in the opinion of the court delivered by Justice McLean.

The effort there was to discredit a witness, who had given a deposition under a commission, by proof of antecedent contradictory statements; and the court were unanimous in the opinion, that as the witness had not been interrogated as to those statements when he was examined, the proof was not admissible. And the court quotes with approbation the opinion of the Supreme court of New York in the case of *Kimball v. Davis*, just cited, holding that where the imputed contradictory statements are alleged to have been made since the taking of the deposition, the adverse party can avail himself of such statements only by taking out a second commission.

The rule, we are told in Greenleaf on Evidence 579, proceeds from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that by first calling his attention to the subject, he should have an opportunity to recollect the facts, and if necessary to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning and design of what he is proved elsewhere to have said. These reasons, it is obvious, apply just as forcibly to depositions as to oral examinations in court. And indeed there are considerations which urge the application of the rule to the case of an impeachment of a witness who has given his testimony in the form of a deposition, which may not arise in an effort to discredit a witness who has been examined in court. In the latter case the witness usually remains in or about the court till the trial is concluded; and if an assault is made upon him by proof of inconsistent

statements, he might, even before the adoption of the rule requiring him to be first examined as to such statements, be recalled and re-examined by the party in whose favor he had testified; and he may thus have an opportunity of repelling or explaining away the force of the assault: Whereas the witness whose deposition has been taken is usually absent from the scene of the trial, and has no shield against attacks on his veracity other than that provided by the rule. And as was very justly said by Chief Justice Nelson in *Kimball v. Davis*, in the absence of such a rule, strong temptations would exist for tampering with witnesses, and for perverting or manufacturing conversations after the taking of the depositions, and when explanations would be impossible.

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Upon the whole, the rule appears to me to be a safe, just and convenient one; and I can see no good reason for refusing to follow the current of authority, in adopting it as a general rule. Cases may be supposed in which the courts may be strongly called upon to dispense with, or to make exceptions to the rule; and I will not undertake to say that special exigencies may not occasionally arise, requiring the courts to depart from the rule, rather than to sacrifice justice by sternly adhering to it. The same remark may, however, be justly made in respect to most rules of a like character, and suggests no serious objection to the adoption and observance of the rule in question as a general one.

There are no peculiar considerations calling upon us to exempt this case from the operation of the rule: For it appears from the deposition, that the plaintiff's counsel was not only present at the taking, but exercised on the occasion his privilege of cross-examining the witness. And as it does not appear that any predicate was laid in the course of the examination, for the introduction of proof of the inconsistent declara-

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The fifth bill of exceptions to the course of the court furnishes, I think, no ground of error. The defendants had a right to be present at court, as well as at the taking of the deposition. And it is manifest from the facts set out in the bill of exceptions, that they could not have attended the taking of the depositions and then have reached the court by the commencement of its session: And the exception to the reading of Gardner's deposition was, I think, properly sustained.

I have been unable to discover any error in the action of the court, and am for affirming the judgment.

The other judges concurred in the opinion of DANIEL, J.

JUDGMENT AFFIRMED.

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1. The creditor of a partnership may lose his remedy against the estate of the deceased partner, by his laches in prosecuting his claim against the surviving partner.
2. In such case there is no definite and fixed rule by which to measure the delay and neglect which will deprive the creditor of his remedy against the estate of the deceased partner. Each case must stand on its own circumstances, and be judged by them.
3. In such case, whilst the creditor may not be held to adopt a very rigorous course, nor to exercise the utmost possible diligence, at least he may be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention during its progress, which may render it probable that in the natural course the money may be made, and the estate of the deceased partner thus saved harmless.
4. Where the creditor fails *bona fide* to use ordinary or reasonable diligence to collect his debt, or where measures have been taken to compel payment from the surviving partner, and there has been gross and unaccountable delay in the proceedings adopted, and it is palpable that the consequence of such delay has been to cast upon the estate of the deceased partner a debt, which might certainly have been obtained from the surviving partner, and which it was his duty to pay, this is such laches as will forbid a court of equity to lend its aid to subject the estate of the deceased partner.

This case was before this court in 1837, and is reported in 8 Leigh 689. In addition to the facts stated in the report of the case in 8 Leigh, it is to be stated that Bolton lived in Baltimore in 1807, when the three notes were executed, on which the judgments were recovered against Connally Findlay as surviving partner of Findlay & Co.; and he continued to live there until his death, without so far, as the record shows, ever having been in Virginia.

The administrator of William King and the former

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representatives and heirs of Connally Findlay, relied on the statute of limitations and the laches of the plaintiff. They also insisted that the judgments should be credited by the amount of a note executed by Trigg, King & Co. of Natchez, and transferred by Connally Findlay & Co. to Jackson, which they allege he had not accounted for. But it appears that he was not expected to take any steps to enforce the payment of that note, and that in fact it was intended to be applied to the discharge of another debt due from Connally Findlay & Co. to him; and that the partners in the firm of Findlay & Co. were partners in the firm of Trigg, King & Co. The heirs of Connally Findlay also insisted that they were entitled to legacies under the will of Thomas King, of whom Connally Trigg was the personal representative, and that they were entitled to have satisfaction out of his estate for their legacies.

After the cause went back from this court, the death of the plaintiff was suggested, and the suit was revived in the name of his administrator, and a commissioner was directed to take an account of the administration of Alexander Findlay and A. B. Trigg upon the estate of Connally Findlay; of the assets which came to their hands and their application; and the dates at which the several debts of said estate were paid, and the dignity and character of each.

The commissioner made his report; from which it appeared that upon the administration account the administrators were in advance to the estate. That of the assets of Connally Findlay & Co. there was in their hands two hundred and fifty-four dollars and sixty-three cents, as of the 1st of January 1823. That the proceeds of the real estate of Connally Findlay in their hands, amounted to one thousand five hundred and seventy-two dollars and thirty-seven cents, which being applied to satisfy the legacies due to the chil-

dren of Connally Findlay under the will of Thomas King, and to satisfy the administrators the amount due to them on the administration account, left but the sum of seventy-five dollars and ninety-five cents remaining: And that the administrators had paid on judgments against Connally Findlay in his lifetime, one thousand three hundred and sixty-four dollars and twenty-five cents, on bonds two hundred dollars, on promissory notes six hundred and ninety dollars, and on accounts six thousand three hundred and fifty-two dollars. And that other lands of Findlay had been sold and the proceeds of sale had been received by the heirs.

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The cause came on again to be heard on the 17th of April 1846, when the court held that the administrators had a right to retain in their hands, so much of the proceeds of the sale of the land belonging to Findlay as was sufficient to pay the legacies due under the will of Thomas King, and the amount due to them on their administration account; and made a decree against them in favor of the plaintiff for the sum of two hundred and fifty-four dollars and sixty-three cents, with interest thereon from the 1st of January 1823 until paid; that being the amount of the assets of Connally Findlay & Co. in their hands. And the court being of opinion that the intestate of the plaintiff had by laches lost his right to recover against the representatives of William King any portion of his debt, the bill was dismissed as to them, with costs. The facts upon the question of the laches of the plaintiff are fully stated by Judge LEE in his opinion. From this decree Jackson's administrator applied to this court for an appeal, which was allowed.

Baldwin, for the appellant.

B. R. Johnston and Patton, for the appellees.

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LEE, J. The defense sought to be made by the appellees under the allegation of payment cannot be maintained. There is no evidence nor even a plausible pretense of such payment, unless the receipt by Jackson of the note of Trigg, King & Co. for seven thousand six hundred and fifty-three dollars and seventy-four cents can be so regarded. But it is not shown that this was received by Jackson on account of this debt. He had at that time a large individual debt against Connally Findlay & Co. besides that which is the subject of demand in the present case, for the benefit of Highland & Galt. He alleges that this note was taken on account of this individual debt, and the character of the receipt given by him would seem to refer to a debt of this character: nor is there any proof to connect this transaction with the claim of Highland & Galt. The amount received upon this note was credited upon the individual claim, and such appropriation upon the proofs cannot be said to have been improper.

But if this note had been received on account of the claim of Highland & Galt, it would not have amounted to payment or satisfaction. It was received as a deposit by way of collateral security merely, without any undertaking on the part of Jackson to take measures for its collection. This is distinctly admitted in the answer of Alexander Findlay: Nor can it be said that because Jackson held the note without collecting it, he had lost his right on that account to call upon the parties from whom the original debt was due for payment. He was not bound to collect the note: he held it to receive payment if voluntarily made, but subject to the directions of Connally Findlay & Co. By their direction he sent it to Natchez, where a part was paid, and after it was returned to him, continued to hold it in the same way; but no application was ever made to him afterwards for it. And even if this application of

the amount received to the individual debt were a misappropriation of the same, it was so in form only, and could not prejudice the estate either of King or Connally Findlay. Both were liable for both debts and thus got the benefit of the credit: and as the estate of William King was also liable for the note of Trigg, King & Co. as was also that of James King and William Trigg, they cannot impute laches to Jackson in failing to coerce payment from themselves.

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Nor will the doctrine of presumptions afford any aid to this defense. The notes bore date on the 23d of November 1807, and were payable in twelve, twenty-four and thirty months after their date, respectively. Suits were brought against Connally Findlay in 1810, and judgments recovered upon two in 1811, and upon the third in 1812; and the present suit was brought in January 1825. Between the maturity of the note first payable and the institution of this suit was a little upwards of sixteen years, and this time upon a question of payment is sufficiently accounted for, and any presumption of payment fully repelled.

Jackson was a nonresident of the state, and was seeking the recovery of his debt by suits against Findlay, the surviving partner. In 1811 a payment of one thousand dollars is made which is credited upon the note first payable. In 1813 the debt is recognized in a letter from Connally Findlay & Co. to Jackson, and payment promised in cotton. In 1817 Findlay pays five hundred dollars, and promises a further payment in a short time; and in the same letter makes his acknowledgments for the indulgence he had received. And in 1819, Findlay having recently died, steps are taken to revive the judgments by writs of *scire facias*. These circumstances would seem to be abundantly sufficient to meet any presumption of satisfaction. But in truth any question of this character must now be regarded as out of the case; for

1855. payment was pleaded in bar of the writs of *scire facias* and the cases were tried upon issues joined on
July Term. that plea, and the jury found in each case against the

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King's adm'r & als.</sup> plea, and judgment was rendered accordingly. And in 1828, under the orders of reference made in this cause, Commissioner Campbell reports this debt as unpaid, and ascertains the amount then due to be eight thousand five hundred and eighty-six dollars and eight cents. Exceptions were taken, it is true, to the allowance of interest and the mode of computing it, but none to the recognition of the debt as still subsisting and unpaid.

The plea of the statute of limitations cannot avail the appellees. As to the representatives of Findlay there can of course be no pretense for its application: and as it respects the representatives of King it may be questioned whether the case would be within its operation. The demand is in equity against the estate of a deceased partner, the creditor having been unable to obtain satisfaction from the surviving partner. But against the latter he had regularly commenced proceedings in due time, and had prosecuted the same to judgment. Whether the court would apply the statute from the same period at which it would commence to run in the action against the surviving partner, or would hold the estate of the deceased partner bound by the proceedings against the latter, and regard the bar of the statute as saved by these, is a question that may not be altogether free from difficulty. But it is unnecessary to express any opinion upon it because it is a sufficient answer to the plea, that the notes were given in Maryland, and that Jackson then was and up to the bringing of the suit continued to be a nonresident of Virginia, and so was within the exception in favor of nonresidents in the act in force at the time the suit was brought. The bill alleged the non-residence of Jackson and a pure plea of the statute

would not avail. It should be accompanied in some form with a denial of the nonresidence, or an allegation that Jackson had been within the state after the cause of action accrued. Sto. Eq. Pl. § 753; Coop. Eq. Pl. 232; *Bayley v. Adams*, 6 Ves. R. 586; *Chapin v. Coleman*, 11 Pick. R. 331; *James v. Sadgrove*, 1 Sim. & Stu. 4. There is no such denial or allegation to be found here, and there is no proof that Jackson ever was in Virginia at any time.

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That the estate of King was not discharged in equity by his death will be readily conceded, but the character of the liability and the time and manner in which it was to be enforced, might admit of serious discussion if they were still open for consideration. The modern English doctrine would seem to be that the liability of the estate of the deceased partner is direct and immediate, and does not depend on the state of the relations between the partners, or the result of measures taken to collect the debt from the surviving partner. But the cases in Virginia would seem to lead to a very different conclusion. *Linney's adm'r v. Dare's adm'r*, 2 Leigh 588; *Sale v. Dishman's ex'ors*, 3 Leigh 548; *Galt v. Calland's ex'or*, 7 Leigh 594; *Jackson v. King's reps.* 8 Leigh 689. These cases and the opinions of the judges, tend strongly to show that the liability of the estate of a deceased partner in any case is not absolute and immediate, but contingent merely, depending upon the result of proper efforts to collect the debt from the surviving partner or his ascertained insolvency.

But what may be the true solution of the abstract question, it is not material to enquire; because for all the purposes of this case the question must be regarded as settled by the decree of this court of the 15th of August 1837. For this court was of opinion and so adjudged, that the representatives of King were properly made parties because they were ultimately chargeable in the event of Findlay's funds proving

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inadequate, unless the equitable rights of the appellant against them were lost by his neglect or misconduct; and that it was premature to hear and dismiss the bill as to them before it was matured as to Findlay's representatives, their liability being dependent upon the issue of the proceedings and the result of the enquiries in relation to Findlay, the surviving partner. Thus it must be taken to be adjudicated between these parties, that the liability of King's estate is not absolute and immediate, but secondary and contingent only, depending on the result of the proceedings against Findlay and the absence of misconduct or neglect on the part of the appellant in commencing and prosecuting such proceedings. These have hitherto been ineffectual, and satisfaction has not yet been obtained from Findlay or his estate; and if any question whether they had been sufficiently tested at the time of the institution of this suit, is now concluded by the decree of 1837, there yet remains by the very terms of that decree, the important enquiry as to the manner in which the creditor has conducted himself in regard to Findlay and his estate, and whether in the course which he has pursued, there has been any such "misconduct or neglect," such laches, as should repel his claim to the equitable relief which he now seeks.

The claim to charge the estate of a deceased partner with the debt of the firm is one recognized in the court of equity only; and as Lord Eldon observed in *Kendall, ex parte*, 17 Ves. R. 514, 526, the right "standing only upon equitable grounds, if the dealing of the creditor with the surviving partner has been such as to make it inequitable that he should go against that fund, (the separate estate of the deceased partner,) he would not, upon general rules and principles, be entitled to the benefit of that demand." Indeed, the opinion of Lord Thurlow in *Hoare v. Contencin*, 1 Bro.

C. C. 27, implies strong doubts as to the existence of any principle upon which a debt extinguished at law by the death of one jointly bound, shall yet be set up in equity against the estate of the deceased party; and Lord Eldon expresses his surprise that a court of equity should have interposed to enlarge the effect of a legal contract in such a case, though he admits the modern doctrine to be that a court of equity will under certain modifications, enable the creditor to resort to the assets of a deceased party who was jointly bound with others who have survived him. *Kendall, ex parte*, 17 Ves. R. 524, 525.

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But this right being thus confessedly the creature of the court of equity, will be administered only upon its own terms and according to its general rules and principles. And it may be waived by the creditor, or it may be lost by the course and conduct which he adopts; and thus the equity which he would otherwise have had, will be entirely repelled. This is distinctly stated by Lord Hardwicke in *Bishop v. Church*, 2 Ves. sen. 371; and is recognized as the law by Judge Carr in *Linney's adm'r v. Dare's adm'r*, 2 Leigh 588, 595, and by Judge Tucker in *Sale v. Dishman's ex'ors*, 3 Leigh 548, 557. As it is expressed by the last named judge, "the equity may be rebutted if the party is guilty of fraud or collusion, or even of laches." The correctness of this doctrine is also very fairly to be deduced from the cases of *Lane v. Williams*, 2 Vern. R. 272; *S. C. 292*; *Daniel v. Cross*, 3 Ves. jr. R. 277; *Devaynes v. Noble, Sleech's Case*, 1 Meriv. R. 396, 528; although under the particular circumstances of those cases the right was held not to have been lost.

What shall be said to be such laches as will deprive the creditor of the right to resort to the separate estate of the deceased partner, in no where ascertained with any thing like precision. As said by Judge

1855. Tucker in *Sale v. Dishman's ex'ors*, there is no settled rule or analogy yet established upon the subject. The same learned judge informs us that to require the same diligence which is demanded in cases of bills of exchange was very readily considered out of the question. And he seems to think that to put the case on the footing of the implied contract for due diligence between assignor and assignee, would be pregnant with the evil referred to by the master of the rolls in *Sleech's Case in Devaynes v. Noble*, 1 Meriv. R. 529. He is of opinion there can be no fair analogy between the case of the deceased partner and that of the assignor of a bond. The latter, he says, has parted with his interest and stands merely as a guarantor: The former was one of the joint debtors, and at his death the obligation ought to devolve with his estate upon his representatives. He agrees however that the court of chancery will not charge his estate with the equity until the insolvency of the survivor is ascertained, but says he is not aware of any express decision which requires the creditor to proceed within any limited time. He appears rather to place the liability on the footing of a suretyship, for he says that what is meant by laches is the failure to sue when required so to do; and that without such requisition he is in no sort culpable, though he agrees that the estate of the deceased partner may also be absolved by collusion, by giving time to the surviving partner, or by new arrangements with him.

With great deference, I think this is unduly limiting the range of the duties devolving upon a creditor who would preserve his resort to the estate of his deceased joint debtor, and within which only he may be guilty of such laches as will absolve that estate. And I incline to think the analogy is stronger to the case of the assignor of a bond than to that of a surety. If we are to regard the estate of the deceased partner

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(as for the purposes of this case it must be regarded) as only secondarily and contingently liable upon the establishment of the insolvency of the deceased partner, it stands in effect like the assignor, as a mere guarantor: it is not liable at once and directly as a surety, nor has it the rights or remedies of a surety against the surviving partner if the debt should be discharged out of the assets. Nor can there be any special fitness in requiring demand upon the creditor from the representative of the deceased partner to sue the survivor. He has no control over the social effects nor the books of the firm: all pass together to the surviving partner. He may not know or have the means of knowing who are the firm creditors, as they are presumed to make no call upon him till they have pursued the surviving partner in vain. And as he may not therefore be able to make the demand upon the creditor to sue, from the very nature and character of the liability, a sufficient warning should be implied that the latter must adopt such a course as will afford a just and reasonable protection to the estate of the deceased partner, and not subject it to wanton or unnecessary peril. I have seen no case sanctioning the suggestion that laches consists only in the failure to sue after request; while in one case it was distinctly held by Lord Hardwicke that the mere failure to sue, after being applied to to do so, will not of itself be sufficient to absolve the estate of the deceased party. *Bishop v. Church*, 2 Ves. sen. 371.

It is in vain to look to the cases for any rule by which to determine the character of his laches, or to measure its precise extent. *Sleech's Case*, in *Deraynes v. Noble*, 1 Meriv. R. 529, only maintains that the creditor shall not be held to a very rigorous course of proceeding, nor required to use the greatest possible diligence to compel immediate payment by the surviving partner; and one of the reasons assigned is that

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such a course might do injury to the estate of the deceased partner by so hurrying the survivor as to disable him from meeting the engagements of the firm, and thus bring a debt upon the estate, which, if less rigor had been exercised, it might have wholly escaped. *Miss Sleech* had suffered her money to remain in the hands of the survivor of a banking firm for some eight months after the death of the other partner, when the former became bankrupt; and it was held by the master of the rolls, Sir William Grant, that her failure to prosecute her demand during this interval was not such laches as would absolve the estate of the deceased partner; and that the fact of her having received a part of the balance due her from the surviving partner, and afterwards signing his certificate as a bankrupt, were not such dealing with him as amounted to a waiver of her claim against the former. But it is no where intimated that the creditor cannot lose his equity by what would amount to laches, but the contrary is fairly implied throughout the whole case; and certainly there is nothing in the case or in the opinion of the master of the rolls to warrant the broad and sweeping terms employed by the chancellor in *Hammersley v. Lambert*, and of which even Judge Tucker expresses disapprobation in *Sale v. Dishman's ex'ors*, 3 Leigh 548, 560.

In *Lane v. Williams*, 2 Vern. R. 277, (Raithby's edition,) the note in question is stated in a note of the editor, to have been of about one year's standing only, though the master of the rolls in *Sleech's Case* supposed the laches to have been much greater than in the case then before him. Judge Tucker supposes that the case is incorrectly reported, and that it may have been decided upon some other principle. *Sale v. Dishman's ex'ors*, 3 Leigh 558 n. Certainly a delay of one year would hardly suffice to bar the creditor's equity except under very peculiar circumstances.

In *Daniel v. Cross*, 3 Ves. jr. R. 277, the interval which occurred before the bankruptcy of the surviving partner, was about two years. The partnership was dissolved in March 1791. The death of the deceased partner had occurred in June 1791, and the bankruptcy of the new concern did not happen till March 1793. It was held that this lapse of time was not sufficient of itself to exclude the claim upon the estate of the deceased partner.

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In *Hamersley v. Lambert*, 2 John. Ch. R. 508, the partnership was dissolved by the death of one of the partners in September 1803. The other partner was discharged under the insolvency law of the state of New York in October 1807. It was held that this delay of some four years would not bar the equity against the estate of the deceased parter.

Yet none of these cases, nor any other that I have seen, can be regarded as establishing any thing inconsistent with the doctrine recognized in the Virginia cases, that such an equity may be lost by the laches of the creditor. It is true in the case of *Hamersley v. Lambert*, the doctrine stated to be deducible from *Devaynes v. Noble*, 1 Meriv. *ubi sup.* 528, is laid down in very broad and general terms. But the case itself will not justify the deduction made from it, nor was the assertion of any such doctrine demanded by the exigencies of that case or of the case of *Hamersley v. Lambert*.

Assuming then that laches will bar the creditor's equity, but finding no precise and definite rule by which to measure the delay and neglect which shall be said to amount to it, each case must, I apprehend, stand on its own circumstances, and be judged of by them. The right to charge the estate of the deceased partner, we are told by the Lord Chancellor in *Kendall, ex parte, ubi sup.* 524, is an equity to be enforced only upon equitable principles; and it should depend there-

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fore, for its preservation, upon the observance by the creditor of good faith, the exercise of a certain reasonable diligence, and the maintenance of a just and proper regard for the rights and interests of the deceased partner. If, as for the purposes of this case we must accept it, the doctrine be that the right to resort to the estate of the deceased partner is secondary and contingent only, depending upon the ascertained insolvency of the surviving partner, or the result of fruitless efforts to obtain payment out of his estate, if the surviving partner be not notoriously or absolutely insolvent at the time of the death of the deceased partner, or at the maturity of the debt, if that only occurred after his death, it cannot be unreasonable to require that the creditor should commence and prosecute with at least reasonable or ordinary diligence, the proper proceedings to compel payment from the surviving partner. While he may not be held to adopt a very rigorous course nor to exercise the utmost possible diligence, at least he may be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention during its progress which may render it probable that in the usual course the money may be made, and the estate of the deceased partner thus saved harmless. The surviving partner takes the whole social effects, and upon him devolves the duty of discharging the partnership debts. He has the appropriate fund out of which they should be paid, and there can be no legal presumption that that fund will prove inadequate. Like the assignor of a bond, the estate of the deceased partner is bound only to guarantee against the insolvency of the surviving partner, and is only to be made responsible when that is established. Why then should the creditor not be held to reasonable diligence as in the case of the assignor? It would be utterly vain and illusory to declare the estate of the

deceased partner to be only liable when the insolvency of the surviving partner has rendered the efforts to compel payment from him ineffectual, if the creditor may rightfully forbear proceedings indefinitely, until the party who might have been previously perfectly good should become insolvent, or having commenced them, suspend collection at pleasure, or suffer them to slumber for a series of years, during which the survivor may waste both the social effects and his own private estate, and thus inevitably cast a debt, which he ought to pay and which might have been made, upon the estate of the deceased partner. The right to call upon his estate to make good the debt upon the failure of the efforts to compel payment from the surviving partner, carries with it, by just and necessary implication, the duty of making such efforts *bona fide*, and with at least ordinary or reasonable diligence. Where this has been wanting, where measures have been taken to compel payment from the surviving partner, but there has been gross, wanton and unaccountable delay in the proceedings adopted, and it is palpable that the consequence of such delay will have been to cast upon the estate of the deceased partner (if it be held liable) a partnership debt of which payment could undoubtedly have ~~been~~ obtained from the surviving partner, and which it was his duty to pay, I think this is such laches as will forbid a court of equity to lend its aid to subject the estate of the deceased partner.

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In *Sale v. Dishman's ex'ors*, all the judges were agreed that the liability of the estate of the deceased partner depends on the ascertained insolvency of the survivor, and from their opinions it is plainly to be inferred that the equity of the creditor may be lost by misconduct or laches. But they considered the question of laches as not sufficiently presented by the pleadings in that case, and therefore that it was not necessary to make any decision upon it. Judge Cabell,

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however, concurs with Judge Tucker in thinking the diligence required is not that which is necessary as between endorser and endorsee, assignor and assignee, though he differs from him in regard to the effect of a failure to sue after request. Judge Carr does not advert to this point, but he gives us a very distinct idea of what was his understanding as to the measure of diligence required in such a case. For he says, "But Sale (the creditor) with Berryman's bond (the surviving partner's bond) in his possession, waited upwards of four years before he took any step to recover the money; and if Dishman's executors (the executors of the deceased partner) had put this matter in issue, and shown us that but for this delay the money might have been made out of Berryman, I strongly incline to think that this also would have been such conduct as would have rendered it inequitable to permit his resort to the estate of Dishman." And he quotes the remark of Lord Hardwicke in *Bishop v. Church*, that "the plaintiff must come as from a pure fountain; must show himself not to be guilty of any laches, much less collusion, turning to the prejudice of the other side, which might be strong enough to rebut that equity set up beyond what the rule of law admits."

So in *Linney's adm'r v. Dare's adm'r*, 2 Leigh 588, we have another illustration of this learned judge's views upon this subject. The debts in question were created the one in 1799, and the other in 1801. Murray, the surviving partner, regularly paid up the interest on the first debt till the 1st of December 1816, and on the last till the 1st of January 1817, and he continued solvent till about November 1817, but afterwards became insolvent, and so died. It was shown that it was owing to Linney's (the creditor's) indulgence that the debt was not early obtained from him; but there was no other proof of laches on his part ex-

cepting the mere delay which he had permitted. The case went off upon the question of jurisdiction, the court being of opinion that there was a plain and adequate remedy at law against Ross, the surety for the debts, who was still living and solvent; but Judge Carr went into an examination of the circumstances, and upon the merits seems to have had no difficulty in declaring his opinion to be that Linney had no well founded claim in equity against Dare's representatives. His remarks on this branch of the case are omitted in the report, but the result at which he arrived must of course have been deduced from the long indulgence given by the creditor, and the failure to collect the debt when it was perfectly in his power to do so, as constituting such laches or such a manifestation of purpose on his part to look to the surviving partner alone, as would put an end to the equity against the estate of the deceased partner.

Let us now glance briefly at the main features of the case before us.

The notes constituting the debt claimed, bear date on the 23d of November 1807. William King died about the 13th of October 1808. On the 21st of November 1809 Jackson took from Connally Findlay & Co. the note of King, Trigg & Co. for seven thousand six hundred and fifty-three dollars and seventy-four cents, but, as he alleges, to be applied to his individual debt. On the 30th of April 1810 he brings suits upon the two notes first payable, and on the 17th of September 1810 he brings suit upon the third. On the 22d of May 1811 a payment of one thousand dollars is made, for which due credit appears to have been given. On the 31st of May 1811 he recovers judgment upon the two notes first named, and on the 29th of May 1812 he recovers a judgment upon the third, all these judgments being against Findlay and the securities for his appearance. Upon the last named judgment an execution was issued on the 14th of

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January 1814, but the same was not placed in the hands of any officer for service, nor was it ever served or returned. Upon the two previous judgments no executions were ever issued. In 1813 Jackson offered to take cotton for the debt; and A. Findlay for Connally Findlay & Co. writes in reply, promising to furnish the cotton accordingly.

In 1817 Findlay acknowledges the receipt of a letter from Jackson "requiring a little cash;" and he sends a note for five hundred dollars, and promises another payment in a short time. And he requests Jackson to accept his thanks for his "silence and indulgence." And the judgments were suffered to stand without any effort to enforce them during the remainder of Findlay's life. He died in 1818, and on the 29th of October 1819 writs of *scire facias* are sued out to revive the judgments against his administrators. These writs are however suffered to slumber on the docket upon the simple issue of payment until June 1827, when executions were awarded. In the mean time, however, that is to say, in January 1825, nearly seventeen years after the death of William King, this bill is filed, alleging that the personal estate of Findlay had been exhausted in payment of other debts, and seeking to charge the real estate belonging to the firm of C. Findlay & Co.; also that of which Findlay died seized, and also the personal and real estate of William King, with the payment of this simple contract debt: and also claiming payment of another debt which was afterwards confessed to have been previously satisfied.

Now, if it may be said there was no delay of which there could be any just complaint up to the rendition of the judgments in 1811 and 1812, what is there to account for or to excuse the great delay that was suffered to occur afterwards? Why were executions not issued upon all of the judgments, and placed in the hands of the marshal for service? If this had been done, there can be no doubt from this record the

debts would all have been immediately made. Findlay had succeeded to the whole social effects of C. Findlay & Co. real and personal, and was also possessed of a considerable estate, real and personal, of his own. He died possessed of a personal estate amounting to upwards of ten thousand dollars, besides certain slaves not accounted for in the settlement of the administration account. Between 1809 and 1817 he appears to have made sundry advancements in slaves to his children. Under the will of William King he was entitled to a legacy of ten thousand dollars, which might have been reached by proper process, and was itself more than sufficient to discharge the whole debt. The real estate also, which might have been subjected, appears to have been considerable and valuable. Yet Jackson, with his judgments not against Findlay only but his appearance bail also in the different cases, who, for aught that appears, may have been perfectly able to make good their respective liabilities, stands by and suffers the whole of this large property to be wasted or appropriated by others, without the slightest effort on his part to have any portion of it applied, as properly it should have been, to his debt. And after Findlay's death he contents himself with issuing writs of *scire facias*, which are suffered to sleep on the docket for years and until nearly every vestige of the large and valuable estate which might readily have been subjected to the debts at any time, had entirely disappeared. What Findlay had not himself disposed of is suffered through the utter neglect of Jackson to be applied to debts of inferior dignity, some due by simple contract merely. And of the real estate belonging to the firm of C. Findlay & Co. nearly the whole is sold and the proceeds appropriated to the payment of a debt which would appear to have been of inferior dignity to those judgments, while that of which Findlay died possessed, the heirs have been.

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1855. permitted to sell and to appropriate the proceeds to
July their own use. And it is perfectly apparent that if
Term. this debt be cast upon the estate of King, it will be

Jackson's because of the neglect of Jackson for years to compel
adm'r payment from Findlay when it was perfectly in his
v. power to have done so at any time.
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I think the whole course and conduct of Jackson amount to such a manifestation of purpose to look to Findlay alone for payment of his debt, or discloses such palpable laches in the pursuit of his plain remedies against him, as should rebut any claim to the aid of a court of equity to set up his demand against the estate of the deceased partner, and that the Circuit court did not err therefore in dismissing the bill as to the representataries of William King.

But although the bill was properly dismissed as to them, I do not perceive why a different and further measure of relief was not afforded against the estate of Findlay. It is apparent that a large portion of the personal assets of that estate was applied in payment of debts of inferior dignity to that of Jackson. The real estate of which Findlay died seized, and which appears to have been worth between three and four thousand dollars, was bound by these judgments, but appears to have been sold by the heirs, (with the exception of two inconsiderable parcels,) and the proceeds applied to their own use. Why and how all this could properly be to the prejudice of the appellant, I cannot see from the record before us. And I think the appellant should be allowed to amend the bill, and to make such further allegations and such additional parties as may entitle him to enquire into the apparent *devastavit* by the administrators of Findlay, and if such be established, to charge those who may be legally responsible for the same, and for this purpose to have the proper accounts directed: and also to investigate further the subject of the real

estate of which Findlay died seized, and the propriety of the disposition made of it after his death, and to hold those who may be accountable for the same, or for the proceeds thereof, if any such there be, to their just responsibilities. And upon such investigation the right of the administrators to retain in their hands so much of the proceeds of the sale of lands as was sufficient to pay the amount due to them and the other devisees of Thomas King, and also the balance claimed to be due to them as such administrators, may be the subject of further consideration.

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I am of opinion to affirm so much of the decree as dismisses the bill as to the representatives of William King; but in all other respects to reverse the same, and to remand the cause for further proceedings.

DANIEL and MONCURE, Js. concurred in the opinion of LEE, J.

SAMUELS, J. concurred in so much of the decree as dismisses the bill against King's representatives; and dissented from so much as directed further proceedings against Findlay's estate; being of opinion that it should have been dismissed as to these parties also.

ALLEN, P. concurred in reversing the decree as to Findlay's representatives. But he was of opinion that the estate of King was not discharged, and that the decree should be reversed as to his representatives.

Decree affirmed in part and reversed in part.

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BUTCHER v. CARLILE.

(Absent ALLEN, P. and LEE, J.)

September 4.

1. By a bond dated the 27th of March 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March 1842, a certain sum of money, with interest; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie: and it is not necessary to notice the provision as to the mode of payment in the declaration.
2. See the opinion of Judge MONCURE for the distinctions in relation to such obligations.

This was an action of debt in the Circuit court of Randolph county, brought by John S. Carlile, for the use of Samuel Gibbons, against Eli Butcher. The case is stated by Judge MONCURE in his opinion.

Fry, for the appellant.

There was no counsel for the appellee.

MONCURE, J. This is an action of debt brought on two obligations, by one of which, dated on the 27th day of March 1840, the obligor bound himself to pay to the obligee, or order, on or before the 25th day of March 1842, the sum of eight hundred and sixteen dollars and five cents, with interest from the 25th day of March 1841, "which sum may be discharged in notes or bonds due on good solvent men, residing in the county of Randolph, Virginia." The other is a single bill obligatory, in the ordinary form, upon which no question arises in this case. The declaration is in the usual form of a declaration on common money bonds: taking no notice of the stipulation contained

in the first mentioned obligation, that it might be discharged in notes or bonds as aforesaid. The defendant craved oyer of the obligations, and demurred generally to the declaration, and each count thereof. The demurrer was overruled; and issue being thereupon joined on the plea of payment, verdict and judgment were rendered for the debt in the declaration mentioned, being the aggregate of the two sums of money in the obligations mentioned, with interest on each. To that judgment a *supersedeas* was awarded.

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The error assigned in the judgment is that an action of debt would not lie on the obligation mentioned in the first count of the declaration, the same "not being for money, but for a specified amount of the notes or bonds of others of fluctuating and uncertain value:" And consequently, that the court erred in overruling the demurrer to that count.

The action of debt only lies for money. On an obligation to pay or deliver any other article, covenant is the proper remedy; and the recovery is of a compensation in damages. Bonds, bank notes and other choses in action are not money, but stand in the same category with other articles in this respect.

When an obligation is in a simple and single form, to pay money, or to deliver any other article, there is no difficulty; and in the former case debt, and in the latter covenant, is the appropriate remedy.

But sometimes the form of the obligation is complex; to pay money in a fixed quantity of some other article; or to pay it in an article whose quantity is not fixed; or to pay money or some other article, in the alternative, on a certain day; or to pay money with a privilege to the obligor to discharge the debt in some other article on a certain day. And in these cases a difficulty often arises as to the meaning and effect of the obligation, and the proper remedy for a breach of it.

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When the obligation is to pay money in a fixed quantity of some other article; as in so many bushels of wheat; or in wheat at a certain price per bushel; or in bonds, bank notes or other choses in action of a certain nominal amount, the authorities all seem to agree that the meaning and effect of the obligation is the same as if it had been in the simple form of an obligation to deliver the article, and that covenant is the proper remedy. *Beirne v. Dunlap*, 8 Leigh 514.

But when the obligation is to pay a sum of money in some other article of which the quantity is not fixed, the authorities are somewhat conflicting as to the meaning and effect of the obligation and the proper remedy for its breach. In Kentucky, it has been held that the proper remedy in that case also, is covenant and not debt. *Watson v. McNairy*, 1 Bibb 356; *Bruner v. Kelsoe*, Id. 487; *Mattox v. Craig*, 2 Id. 584; *Noe, &c. v. Preston*, 5 J. J. Marsh. 57; also in Arkansas, *Jeffrey v. Underwood*, 1 Pike's R. 108; and perhaps in some other states. But the weight of authority, and I think the better opinion, is the other way. Such was certainly the opinion of this court in *Beirne v. Dunlap, supra*, in which the Kentucky cases to the contrary were disapproved. See also 2 Bac. Abr. title Debt A, citing And. 177; and *Bollinger v. Thurston*, 2 Rep. Const. Ct. S. C. 447; *Bloomfield v. Hancock*, 1 Yerg. R. 101; *Young v. Hawkins*, 4 Id. 171; *Henry v. Gamble*, Minor's R. 15; *Bradford v. Stewart*, Id. 44.

An obligation to pay a sum of money in bonds, bank notes or other choses in action would seem at first view to fall under the last of the two above mentioned classes; and to be for payment in an article of which the quantity is not fixed. But in fact it falls under the first; and is for payment in an article of which the quantity is ascertained. This arises from the peculiar nature of the article; "which is enumerated in dollars and cents as specie is." *Campbell v.*

Weister, 1 Litt. R. 30. "To pay one hundred dollars in bonds or bank paper, (says Parker, J. in *Beirne v. Dunlap*,) means bonds or notes calling for that sum, which the obligors or banks are bound for."—"And if so, an action of debt will not lie, unless it would lie upon a promise to pay a fixed quantity of any commodity of fluctuating value. In this respect there is no difference between bank paper and any other commodity. Paper may rise or depreciate in value before the day of payment; and if the day passes when the contract is to be fulfilled, the measure of the obligee's rights and of the obligor's liabilities is the value of the notes on that day, to be ascertained by the verdict of a jury, and awarded in damages." It was therefore held in that case that covenant and not debt was the proper remedy where the money was to be paid "in notes of the United States Bank or either of the Virginia banks." The court construed the obligation to be, in effect, an obligation for the payment of bank notes and not of money. See also *Jackson v. Waddill*, 1 Stewart's R. 579; *Young v. Scott*, 5 Alab. R. 475; *Deberry v. Darnell*, 5 Yerg. R. 451; *January v. Henry*, 2 Monr. R. 58; S. C. 3 Id. 8; *Sinclair v. Piercy*, 5 J. J. Marsh. 68; *Day v. Lafferty*, 4 Pike's R. 450; *Hudspeth & Sutton v. Gray, Durrive & Co.* 5 Id. 157.

When the obligation is to pay a sum of money, or some other article, in the alternative, on or before a certain day; or to pay a sum of money, with a privilege to the obligor to pay it in some other article on or before a certain day, the obligor has his election to deliver the article on or before the day; but if he fail to do so, he is liable absolutely for the money, and of course to an action of debt for its recovery. Story on Cont. § 969; *Choice v. Moseley*, 1 Bailey S. C. R. 136; *Henry v. Gamble*, Minor's R. 15; *Bradford v. Stewart*, Id. 44; *Crawford v. Daigh*, 2 Va. Cas. 521.

Sometimes the obligation has apparently been for

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the payment of bank notes or other currency than money; and yet the obligor has been held liable in an action of debt. In *Crandford v. Daigh*, 2 Va. Cas. 521, the note was for the payment of sixty-four dollars in good state bank paper, payable one day after date. The court was of opinion that state bank paper was not here mentioned as contradistinguished from money, but from other paper in circulation then less valuable than money. Payment was to be made in a currency of equal value to money, and one day after the date of the note. In this respect the case differed from *Beirne v. Dunlap*; in which the obligation was for the payment in notes of the United States Bank or either of the Virginia banks more than a year after its date. These notes at the date of the obligation and when it became payable, were current at par. But that they were so current when it became payable, was an accident, which, in the opinion of this court, did not affect the form of the remedy. They might have greatly depreciated in value in the mean time; and if they had so depreciated, the obligor would still have had the right to discharge his obligation by paying it in their nominal amount. In *McConnel v. Caldwell*, cited in 1 Yerg. R. 101, the promise was to pay four hundred dollars in specie, or current bank notes. The action of debt was sustained on the ground that the parties had referred their contract to a specie standard; and that the case was distinguishable from the leading Tennessee case of *Gamble v. Hutchinson*, Peck's R. 130, where the money was payable in current bank notes, and it was held that debt did not lie. In *Spain v. Grove*, 1 Minor's R. 177, the promise was to pay one hundred and fifty-three dollars in good current money of the state of Tennessee equal in value to the said sum of one hundred and fifty-three dollars. The chief justice, in delivering the opinion of the court, said, "If it were necessary to impannel a jury to enquire

of the value of the Tennessee currency, the jury would be bound by the valuation fixed on by the parties; the only inference we can draw from the expressions used in the note is that if paid in good Tennessee currency, the maker should make the payment equal in value to specie." The action of debt was accordingly maintained.

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While, therefore, certain general rules have been adopted, as means of ascertaining the intention of parties; the end in view in every case is, to ascertain the intention from the contract; and when so ascertained, effect will be given to it, if lawful.

Let us now apply these principles to the case before us. The obligation was to pay, on or before a certain day, which was about two years after its date, a certain sum of money and interest, "which sum may be discharged in notes or bonds, due on good solvent men residing in the county of Randolph, Virginia." I think this is clearly an obligation for the payment of a sum of money, with a mere privilege to the obligor to discharge it in notes or bonds of the description mentioned, on or before the day on which it became payable; and having failed so to discharge it, he is liable to an action of debt therefor, according to the principles before stated. The promise to pay, in the first place, is absolute; and the form of expression which follows, to-wit: "which sum *may* be discharged," &c. indicates mere permission or privilege. The obligee had only a right to demand the money. He had no right to demand notes or bonds. The obligor had a right to pay in money; or in notes or bonds, provided he paid them on or before the day fixed for payment. From the terms of the obligation the debt was obviously a money debt; but the obligor wished to have, and stipulated for, the privilege to pay it in notes or bonds of a certain description. It might or might not be convenient for him to pay in such notes or bonds.

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He might or might not have them, or be able to get them; or might prefer to pay the money and keep the notes or bonds, if he had them. The obligee might have been as willing to receive notes or bonds as money, if they had been tendered to him in due time. And to compel him now to receive the value of such notes or bonds according to the uncertain assessment of a jury, would be gross injustice to him, as well as a palpable departure from the true intent and meaning of a contract. If the privilege had been to pay in bank notes, instead of the notes or bonds of individuals, there might have been some room for contending that notwithstanding the form of the obligation, it was in effect payable in bank notes. Bank notes are currency, though sometimes of depreciated value. And if they are of such value, it is certainly the interest of the obligor to discharge his obligation by paying them, and is generally more convenient for him to pay them than to pay money. But the notes or bonds of individuals are not currency; and whether it will be for the interest or convenience of an obligor to pay his debt in them or in money, is dependent on the peculiar circumstances of each case. This fact would be entitled to much consideration in determining the meaning of the obligation if its terms were not otherwise sufficiently plain, as I think they are.

The obligor having failed to pay the money in notes or bonds on or before the day fixed for its payment, and thus become liable absolutely for the payment of the money, an action of debt was maintainable against him for it; and it was unnecessary for the declaration to charge the nonpayment of the debt in notes or bonds. The obligation then became in effect a simple and single bill obligatory. In *Crawford v. Daigh*, *supra*, the note was for the payment of money in good state bank paper; and yet the court held that after the day fixed for such payment was passed, it was

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a note for the payment of money only, and being set out as such in the declaration, was set out according to its legal effect. See also *Henry v. Gamble, supra*. *A fortiori*, when the obligation is to pay money, with a mere privilege to the obligor to pay in some other article on or before a certain day, it is unnecessary to take any notice of such privilege in the declaration. See *Bradford v. Stewart, supra*. The privilege is in the nature of a defeasance, which need never be stated in a declaration, but is matter of defense, and ought to be shown in pleading by the opposite party. 1 Chit. Pl. 255.

I am for affirming the judgment.

DANIEL and SAMUELS, Js. concurred in the opinion of MONCURE, J.

JUDGMENT AFFIRMED.

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1. Suits for freedom must be brought in one of the courts of the county or corporation in which the party suing is detained by the person having him in custody.
2. Where a person having persons of color in his custody, claiming them as slaves, resides in one county and holds them in that county, and brings them into another county in obedience to a writ of *habeas corpus* sued out by them, this is not such a detention of them in this last county, as will give the courts thereof jurisdiction of a suit instituted by them there, for their freedom: And this especially if the resort to the writ of *habeas corpus* was a contrivance to give jurisdiction of the case to the courts of the county to which they are so brought.
3. In such a case the court should dismiss the suit, upon the motion of the defendant. And a rule upon the plaintiffs to show cause why the suit should not be dismissed, is a proper mode by which to raise the question of jurisdiction.
4. Though the petition of the paupers and the warrant of the justice are returned into court at one term, when one of the claimants enters himself a party, and the cause is then continued; and though depositions are taken by consent to be read on the trial, before the next term, yet no summons having been served on the person in whose custody the paupers were, he having entered himself a party at the next term, may then have the suit dismissed for want of jurisdiction: And it will be dismissed as to both defendants.*

By a petition bearing date the 10th day of March 1851, Harrison Polly, and three others, his brother and two sisters, applied to John W. Hite, a justice of the peace for Cabell county, stating that they were free persons of color, and were then in the possession of William Ratcliff, who held them as slaves: And they prayed that a summons might issue authorizing the

* The substance of the statute is stated by Judge DANIEL in his opinion.

sheriff of Cabell to take them into his possession for safe keeping, until the first day of the next term of the Circuit court of Cabell county, with leave for the petitioners to sue for their freedom. This petition was sworn to on the 12th of March by L. D. Walton; and on the same day the justice issued his warrant to the sheriff of Cabell county, directing him to take possession of the petitioners, and have them before the Circuit court of Cabell on the first day of its next term; and he was required to give to William Ratcliff notice of the detention, and the cause thereof. On the same day the sheriff took possession of the petitioners, but surrendered them to William Ratcliff, upon his executing a bond with sureties as prescribed by the statute, to have them forthcoming on the first day of the next term of the said Circuit court.

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On the 17th of May 1851 the papers were returned into the Circuit court, and it was ordered that the suit be docketed; and on motion of Jarrett C. Ratcliff, he was admitted a defendant in conjunction with William Ratcliff; and the cause was continued until the next term.

On the 18th of October 1851 an order was made requiring the plaintiffs to show cause on the next Monday, why the suit should not be dismissed as having been improperly brought in the county of Cabell instead of the county of Wayne. On that day, in order to sustain the motion to dismiss the suit, the defendants filed the affidavit of William Ratcliff, in which he stated that he claimed the plaintiffs as slaves: That at the time of the commencement of this suit he was and still is a resident and citizen of Wayne county, and not of the county of Cabell. That he held and detained the plaintiffs in his custody in the county of Wayne alone, until he was commanded by a writ of *habeas corpus* to bring them to the county of Cabell. That in obedience to said writ he brought them to the

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county of Cabell; that said writ was returnable on the 12th of March 1851. That the petition of the plaintiffs is dated on the 10th of March, two days before the return day of said writ; and the warrant of the justice and affiant's bond for the forthcoming of the plaintiffs, are both dated on the 12th of March, the return day of the writ. And that but for the issuing of said writ of *habeas corpus*, he would not have had the plaintiffs in the county of Cabell in custody or otherwise. The facts stated in this affidavit the plaintiffs admitted to be true.

The defendants also introduced the petition of the plaintiffs to the judge of the Circuit court for a writ of *habeas corpus*, and also the writ directed to William Ratcliff, requiring him to have the plaintiffs before the judge of the Circuit court of Cabell county, at chambers in the town of Guyandotte, on the 12th day of the then present month. This writ was dated the 8th of March 1851. On the return day of the writ Ratcliff produced the plaintiffs before the judge as directed, and made a return that he claimed them as his slaves. They also introduced the petition to the justice, the warrant and bond. The plaintiffs introduced another affidavit of William Ratcliff, which was made before the judge on the return day of the writ of *habeas corpus*, in which he states from whom he purchased the plaintiffs, and what he had understood of their previous history: And they also introduced a number of depositions taken by consent on the same day and subsequently, to be read as evidence for them in the Circuit court: But it is unnecessary to state their contents. The court discharged the rule and the defendants excepted.

The cause came on for trial in September 1854, when the defendants filed four other bills of exceptions to rulings of the court, in which the questions alluded to in the opinion of Judge MONCURR are

raised: but none of the questions reserved in these exceptions were considered by this court; and it is therefore unnecessary to state them. There was a verdict and judgment for the plaintiffs establishing their freedom; and from this judgment the defendants applied to this court for a *supersedeas*, which was allowed.

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The case was elaborately and ably argued on all the points involved in the cause, by *Fisher* and *McComas*, for the appellants, and *Fry* for the appellees; but the only question considered by this court is that arising on the motion to dismiss the suit.

DANIEL, J. The first question presented for our consideration is, whether the proceedings in this case were properly commenced in the county of Cabell; and I experience no difficulty in answering it in the negative.

The first section of ch. 106 of the Code, p. 464, provides, that where any person conceives himself unlawfully detained as a slave, he may petition the Circuit court or court of the county or corporation in which he may be detained, for leave to sue for his freedom, or he may complain thereof to a justice. The second section provides that if the complaint be made to a justice, he shall, by precept in writing, give the complainant in charge to the proper officer, to be produced before the Circuit court or court of the county or corporation, (as the complainant may elect,) at the next term thereof; and in the mean time to be safely kept at the expense of the person claiming to be the owner; and shall cause such person to be notified thereof. And the third section provides that if the person claiming to be the owner, or some one for him, will enter into bond, approved by the officer having the complainant in charge, in a penalty equal to double the value of the

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complainant, supposing him to be a slave, conditioned to have him forthcoming before the said court at the next term thereof, such officer shall deliver to him the complainant.

The section of the Code of 1819, p. 481, corresponding with the first section just cited, requires the complaint to be made "to a magistrate out of court, or to the Circuit court for the county, or to the court of the county or corporation where the complainant *shall reside, and not elsewhere.*"

We have no report of any decision in our court ascertaining the sense in which the term "residence" is used in the act of 1819. But I apprehend that it could never have been in the contemplation of the legislature, that, in controversies about jurisdiction in such cases, the will or choice of the complainant could be referred to as having any influence in solving questions as to his residence.

It is not necessary to enquire whether the Code of 1819, in fixing the jurisdiction by the residence of the complainant, had reference to his temporary or to his permanent residence. It could hardly have been the meaning of the law that such residence could be acquired against the consent of the owner or person claiming to stand in the relation of master. The very nature of the subject excludes the idea that it could have been competent for a person detained as a slave and having a residence in one county, appointed and fixed by his master or claimant, by running away into another county, to acquire a residence in the latter, so as to give to its courts jurisdiction of a suit brought by the runaway, for his freedom. And the aspect of the question would not be materially changed by supposing a temporary change of the residence of the complainant, effected by means of process issuing in a proceeding set on foot by himself, constraining the master to carry him away from the place of residence

he had selected for him in one county into another county, to appear before a legal tribunal held in the latter.

The same course of reasoning, it seems to me, holds good in determining the place in which the complainant, under the first section of the present Code, is to be regarded as *detained* in slavery. As the relation of master and slave is, from its very nature, incapable of suspension, it may, in some sense, be said that a person held in slavery is *detained* as a slave in every place in which he may be, for any period of time, however short, during the existence of the relation. But as under the former laws it was not intended that the complainant should have any voice or mind in the selection of his *residence*, so under the present law it is equally clear, I think, that he cannot be allowed, by any act of his, done without the consent of his owner, or by any act of the officers of the law, done at his instance, so to change the place in which he is *detained* as to transfer, from the courts of one county to those of another, jurisdiction of a petition for leave to sue for his freedom. There is show of reason in the argument that the legislature, in ascertaining the jurisdiction of such suits by the place of the detention, instead of the place of the residence of the complainant, designed to get rid of serious questions which might otherwise arise as to the nature of the residence, as whether casual or permanent, which should determine the jurisdiction, and to disembarass the remedy of those impediments which the owner or claimant seeking to evade a suit, by running off the complainant, might place in the way, by objecting to a suit brought in any county through which he might be passing, that it was not brought in the county in which the complainant resided. Be this as it may, it is, I think, obvious that the place of the jurisdiction is that in which the owner chooses to exercise his

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rights as master; that in which he willingly detains the complainant, and not that in which the presence of both the owner and complainant is brought about by the acts of the latter against the will and consent of the former.

With these views of the law, it is only necessary to refer to the affidavit made by the plaintiff in error, William Ratcliff, as the foundation for the rule to show cause why the suit should not be dismissed, (*the facts stated wherein were admitted by the complainants to be true,*) to show that the courts of Cabell county had no right to take jurisdiction of the case. The affiant states in his affidavit, that he claimed the complainants as his slaves; that at the time of the commencement of the suit, he was and still is a resident and citizen of the county of Wayne, and not of the county of Cabell; that he held and detained the complainants in his custody at his residence in the county of Wayne alone, until he was commanded by writ of *habeas corpus* to bring them to the county of Cabell; that in obedience to the commands of said writ, he did bring them to the said county of Cabell; that said writ was returnable on the 12th day of March 1851, and that their petition for leave to sue in *forma pauperis* is dated the 10th of March 1851, two days before the return day of said writ; that the warrant of the justice authorizing them to do so, is dated on the 12th day of March, the return day of the writ, and the bond of the affiant for their forthcoming and delivery to answer the judgments of the court, dated the same day: And that but for the issuing of said writ of *habeas corpus* he would not have had the plaintiffs in the county of Cabell in custody or otherwise.

It is thus seen that the detention of the complainants by Ratcliff in the county of Cabell, was involuntary, and constrained and effected by legal proceedings set on foot by the complainants them-

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selves; and that the case is brought fully within the influence of the views which I have presented in respect to the jurisdiction.

If, however, I could doubt as to the correctness of these views as furnishing a rule of universal application, and could be induced to believe that an exception might be made in a case where it appeared that a petition for a *habeas corpus* had been resorted to by the complainant in good faith as a means of trying his right to freedom, and not as a means of effecting a change of jurisdiction, and had been afterwards in like good faith, upon further advice and reflection, substituted by the proceedings pointed out in the statute, taken in the county to which the complainants and the owner might be brought by virtue of the *habeas corpus*, I should still hold that in this case there is not only nothing to justify such an exception, but that, on the contrary, the case is one calling for the most rigid application of the rule. The petition for the *habeas corpus* is dated and allowed by the judge on the 8th of March, and as has been before stated, was returnable on the 12th. Yet we find that the petition for leave to sue in *forma pauperis*, is dated on the 10th, before any return was made or could have been made to the writ of *habeas corpus*. When the petition was presented to the justice does not appear, but his warrant is issued on the 12th.

On the rule to show cause why the suit should not be dismissed, the complainants, whilst admitting the truth of Ratcliff's statement that he had brought them in the county of Cabell in obedience to the writ of *habeas corpus* alone, offer no explanation, by affidavit or otherwise, of their conduct in first procuring the *habeas corpus*, and then substituting the proceedings upon it by a regular suit so soon as they had thus effected a change in the place of their detention. Thus leaving their proceedings exposed, without explanation, to all

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the inferences of having originated in an unfair effort to change the jurisdiction to which they are, on their face, so plainly obnoxious.

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The facts of the case unexplained do, I think, furnish ample warrant for the conclusion, that in presenting the petition for a *habeas corpus* the complainants did not, *bona fide*, seek to resort to it as a proper method of trying the right to freedom, (an office which, in such a case, it could not properly perform,) but that they took this course as a devise by which they might be enabled to shift the scene of the trial of the regular suit they designed bringing, from the county of Wayne to the county of Cabell.

To sustain the jurisdiction of the circuit court of Cabell under the circumstances of this case, would be to countenance a course which might operate in some instances most unjustly and oppressively on such as may happen to hold in their possession persons of color claiming a right to freedom. Under such a practice the defendant may not only be subjected to the alternative of finding security in a county remote from the residence of himself and his friends, or of surrendering his property to the sheriff, but compelled to try his right in a place where it may be jeopardized by the difficulty of procuring the full attendance of his witnesses; and where he must necessarily encounter greater trouble and expense in making his defense than he would be exposed to if the trial were had within the jurisdiction contemplated by the law.

It remains to be considered whether the objection to the jurisdiction was taken in a proper mode, and also whether there is anything in the record to show that the plaintiff's in error have waived or lost their right to make the objection.

By a reference to the 4th, 5th and 6th sections of chapter 106 of the Code, already cited, it will be seen that the proceedings at rules, the declaration and

pleadings that were provided under the former law, are dispensed with. The court to whom the petition is presented is required, in the sections just mentioned, to assign the petitioner counsel, whose duty it is made to file with the clerk a statement in writing of the material facts of the case, with his opinion thereon; and unless it appear manifest therefrom that the suit ought not to be prosecuted, the court is further required to cause the person claiming to be the owner, to be summoned to answer the petitioner; and is to proceed at the next term to the trial of the case, without regard to its place on the docket, having first impaneled a jury, which, without the formality of pleading, is to try whether the petitioner is free or not.

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It is hardly to be supposed that the legislature, in thus dispensing with the rules, at which pleas to the jurisdiction in other cases, are usually entered, and also with all formality of pleading in court, designed that questions of jurisdiction should be litigated before the jury without notice to the petitioner; and it is equally hard to suppose that they designed to debar the defendants to such action, of the right to insist, in some mode, on the want of jurisdiction in the court before which they are cited to appear. In this state of the legislation on the subject, a rule upon the petitioner to show cause why the suit should not be dismissed for want of jurisdiction, founded on an affidavit of the facts on which the defendants mean to rely, seems to me to furnish as fair and convenient a mode of bringing said questions to the notice of the court as any that can be devised. I can see then no objection to the mode in which the defendants sought to rely on the want of jurisdiction in the court. Nor can I perceive any thing in the record to show that the rule was not asked for in good time. The petition and warrant were returned into the Circuit court at its May term 1851, which was the first after the issuing of the war-

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rant; whereupon, in the language of the record, "it is ordered that this suit be docketed, and on motion of Jarrett C. Ratcliff, he is admitted a defendant in this cause with the said William Ratcliff; and for reasons appearing to the court, this cause is continued till the next term." No statement of the case, no opinion of counsel, was filed at this or at any other term of the court. No summons was issued citing the defendants to the suit or either of them, to answer the petition; and no counsel appears to have been assigned to the petitioners. I do not deem it necessary to enquire what effect these departures from important requirements of the statute might have had on the judgment and verdict, if it was shown that the plaintiff in error had gone to trial without objecting to the jurisdiction of the court. But in the absence of a compliance on the part of the petitioners with these provisions, it can hardly be said that William Ratcliff was in any default when at the next succeeding term, the October court, he obtained the rule to show cause why the suit should not be dismissed. No summons had been executed upon him, and the first entry on the record which notices his appearance is that which records his motion for the rule.

I cannot perceive the force of the argument founded on the fact that it appears by the record that depositions had been taken, by the consent of the parties, before the May term, and between that and the October term, to be read on the trial of the cause. I know of no rule which would give to such consent the effect of controlling either of the parties in presenting the pleadings which they would otherwise be allowed to file, whether in the prosecution or the defense of their rights.

It seems to me that the objection to the jurisdiction was taken in a proper mode, and so far as William Ratcliff is concerned, in good time; and as the mo-

tion to dismiss the suit was founded on defects of jurisdiction not personal to him, but showing that the defendants in error had no right to institute their proceedings in the county of Cabell, that the court on the hearing of the rule ought not to have discharged it, but ought to have made it absolute, and to have dismissed the suit. And I am therefore of opinion, without expressing any opinion on the other causes of error assigned in the petition, to reverse the judgment, to set aside the verdict, and to dismiss the case.

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MONCURE, J. I concur in the opinion of Judge DANIEL, except that, instead of dismissing the suit, I am for remanding it for removal to the Circuit court of Wayne to be tried therein, under § 3 of ch. 174 of the Code, p. 657.

The motion to dismiss the suit for want of jurisdiction was not made until after many depositions had been taken, by both parties, some of them expressly by consent of parties, to be read as evidence on the trial of the suit in the Circuit court of Cabell; and after it had been docketed, and continued at the preceding term, apparently without objection. Under these circumstances, I think it would have been wrong to have dismissed the suit, and thus deprived the parties of the benefit of their depositions; but that it would have been proper to have ordered it to be removed to the Circuit court of Wayne.

Whether I would have reversed the judgment merely for the failure to order such removal, no specific motion for that purpose having been made, it is unnecessary to determine. I would have reversed it for other errors apparent in the record. I think the Circuit court erred in instructing the jury that inability to contract from voluntary drunkenness did not stand on the same ground as insanity or incapacity produced by the visitation of God; and that unless the intoxication

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The other judges concurred in the opinion of DANIEL, J.

Judgment reversed, the rule made absolute, and suit dismissed.

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R takes a conveyance from his son in law P of the equity of redemption in certain land, and salt manufactories and implements thereon, which P had derived from R, and which he had previously conveyed in trust to secure certain debts, for some of which R was his surety, and among them two debts which were due to two of the sons of R; and R covenants with P to pay the debts secured upon it. R then enters into a covenant with his two sons, by which the property conveyed by P to R, is put into their possession; and they covenant to manage the same, and apply the proceeds to the payment of the debts secured thereon, until said debts are paid out of the proceeds, or until the land should be sold under the deeds of trust or otherwise, so as to discharge all of said debts out of the proceeds. And R covenanted that he would not convey or encumber said property, or any other property of R, to, or for the benefit of, P, until said debts are paid; and that no bequest or devise by R to P or to P and his wife, should take effect or accrue to his or their benefit, nor should any right of theirs as heirs at law of R take effect for their benefit, until said debts should be fully discharged. R afterwards by his will gave certain real estate to P, and he probably died intestate as to a part of his estate. The sons went on to manage the property, expended a large amount in repairing it; and one of them advanced a large sum to pay the two preferred debts upon the property. And it was doubtful if the property was a full security for the debts upon it. P being about to sell a part of the real estate devised to him by R, the sons enjoined the sale on the ground that under their covenant with R, they had an equitable lien upon the property devised to him by R.

HELD:

1. That the property in possession of the sons was first liable to the payment of the debts; and if that was not sufficient, they had an equitable mortgage on the property devised by R to P or inherited by P or his wife, which should be applied to pay the balance of said debts.
2. That in taking an account, the sons were to be allowed for any proper expenditures for repairs of the property put into their possession; for the amount advanced by them or either of them to pay the two preferred debts; for all the other debts secured upon the property, and for the expenses attending the conduct and management thereof; and were to be charged with the gross profits of the property.

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3. **Quere:** If the sons are entitled to compensation for their labor and trouble in the management of the property? And it seems they are not.

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v. This was a bill by Henry and Lewis Ruffner to en-
Putney & others. join and restrain Richard E. Putney from conveying
away or disposing of certain property devised to Put-
ney or Putney and wife, by David Ruffner deceased;
and to subject the same in the hands of said Putney,
or in the hands of purchasers from him, upon the
grounds of an equitable mortgage which the plaintiffs
claimed under an agreement with David Ruffner. The
injunction was granted; and Putney, and Shrewsbury
a purchaser from him, filed their answers; whereupon
upon their motion the injunction was dissolved. The
plaintiffs then applied to this court for an appeal, which
was allowed. The facts are stated by Judge SAMUELS
in his opinion.

Patton, for the appellants.

B. H. Smith and Fry, for the appellees.

SAMUELS, J. The appeal in this case is taken from an order of the Circuit court of Kanawha county, dissolving an injunction on motion of the defendants below, the appellees here. In ascertaining the facts of the case, on such motion, the allegations of the bill are to be taken as true, unless denied by the answers or disproved by evidence in the record: Any affirmative allegations in the answers, if not sustained by proof, will be disregarded by the court. Looking to the facts to be ascertained by the rules above stated, the record shows this case:

David Ruffner by deed, on the 19th of October 1825 conveyed to his son in law Richard E. Putney, a parcel of land lying in Kanawha county, on which are situated a salt well, salt furnace and other necessary structures and fixtures for the manufacture of

salt. On the 14th of May 1835, said Ruffner executed an olograph will, in which he subjected portions of his real estate to the payment of his debts; he made specific provision in real and personal estate for his wife Ann; he devised portions of his real estate severally to his sons Lewis Ruffner and Henry Ruffner, and his sons in law Richard E. Putney and Moses M. Fuqua. He also gave to his wife any *residuum* of money which might be due to him, and of the proceeds of certain real estate devised to be sold, after payment of debts. There is no general residuary disposition of testator's estate; nor does it appear what estate, if any, was left to pass under the statutes of descent and distribution, to the heirs at law and next of kin.

On the 20th of May 1840, Putney executed a deed of trust on the real estate conveyed to him by Ruffner on the 19th of October 1825, as above stated, to secure a debt of ten thousand two hundred and eight dollars and eighty-six cents, with interest from the 20th of May 1840, due to Dickinson and Shrewsbury.

On the 25th of August 1841, Putney executed another deed of trust on certain slaves hereafter to be mentioned, to indemnify William Tompkins and Andrew Donnally as his securities in a debt of two thousand five hundred dollars.

After executing the two deeds of trust above mentioned, Putney, on the 12th of March 1842, executed a deed conveying to David Ruffner his equity of redemption in the land and slaves included in those deeds, also the absolute title to a quantity of other personal property. The deed from Putney to Ruffner recites that Putney owed certain debts therein specified, for some of which Ruffner was bound as security; among the debts specified was one to Henry Ruffner, the son of David Ruffner; and another to Lewis Ruffner, another son; and several to Lewis Ruffner, and

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various other and different persons, his partners in different firms; that suits had been brought on some of the debts. The aggregate principal of the debts recited as being due is between nine and ten thousand dollars; the principal of the debts due to Henry Ruffner, to Lewis Ruffner, and to Lewis Ruffner and others, amounted to near five thousand dollars. David Ruffner signed and sealed the deed from Putney to himself, and thereby covenanted, in consideration of Putney's conveyance to him and of one dollar, to pay the debts therein specified; thus in effect to indemnify Putney against them.

Very soon after the 12th March 1842, that is, on the 16th day of the same month, mutual covenants between David Ruffner of the one part, and his sons Henry Ruffner and Lewis Ruffner of the other part, were entered into, reciting the fact of the conveyance by Putney to David Ruffner, and of David Ruffner's covenant in consideration of that conveyance; and that said David Ruffner wished to free himself from the personal cares and responsibilities incurred by the terms of the said deed of conveyance; and it was agreed between the parties, that David Ruffner should forthwith deliver the lot of land conveyed, together with the salt furnace and all the appurtenances, into the possession, use, management and control of the said Lewis and Henry Ruffner, to the exclusion of all other persons, to be by them used and enjoyed at their discretion, for the purpose of paying, out of the net proceeds thereof, the debts and liabilities which said David assumed to pay in consideration of the deed of conveyance from said Putney as aforesaid, until said debts and liabilities should be fully paid and discharged out of the said proceeds, or until the land thus committed to their charge should be legally sold under deed of trust, or sold otherwise, so as to discharge all the said debts and liabilities from

the proceeds of the sale. And reciting that whereas the said Putney, with his wife, daughter of said David, would in case of said David's decease become as heir at law or by testament, entitled to a share in the estate, real and personal, of the said David, unless otherwise provided for by said David himself; and thus injustice be done to said Henry and said Lewis, by leaving them responsible for debts and liabilities contracted by said Putney on his own account; therefore, said David did thereby agree and bind himself not to make over, lease or convey in any manner to said Putney, or transfer to any person for his the said Putney's benefit, or that of his heirs or assigns, any part whatever of the lands, salt furnace and appurtenances aforesaid, nor any portion of said David's lands or other estate, real or personal, nor any way encumber or pledge the same for the benefit of said Putney, or for the payment of his debts, other than those which said David had already assumed to pay, or was otherwise liable to pay at the then present time, until all the said debts and liabilities should be fully paid and discharged; providing, however, that the terms of the agreement should not preclude the said David from conveying to the said Putney for a valuable consideration a building lot above George's creek, to be improved at his own expense. And the said David agreed that Lewis and Henry Ruffner should have the free use of coal on his land for the supply of the furnace, committed as above mentioned to their management for the payment of the debts aforesaid. And it was agreed and understood by the parties to the agreement, that no bequest or devise which said David might have made or might thereafter make in his last will and testament to said Putney and his wife, or to their heirs and assigns, should in any wise take effect or accrue to the benefit of said Putney, his wife, or their heirs or assigns; nor should any right or title

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1855. which they should acquire as heirs at law, be valid or
July take effect for their benefit until said debts and liabilities should be fully discharged and paid off. The
Term. said Lewis and Henry agreed and covenanted on their

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& others.** part, to use due care and diligence in the management of the said furnace and its appurtenances, and to apply the net proceeds thereof to the payment and liquidation of the debts and liabilities aforesaid; and to render annually to said David as accurate an account as the nature of the case would admit, of both the gross proceeds of the said furnace, and the net proceeds remaining after all necessary charges should be deducted, and also an account of the application of such proceeds to the payment of the debts aforesaid; and should the property thus committed to their charge have at any time been freed from incumbrance by the discharge of the said debts and liabilities, then the said Henry and Lewis were to deliver up the possession and management of the same to the said David, or his legal representatives.

In pursuance of the agreement with David Ruffner, the other parties, Lewis Ruffner and Henry Ruffner, took possession of the property, and actively prosecuted the business of manufacturing salt. They expended not less than three thousand dollars in repairing the property, but the necessity or utility of such expenditure is denied by Putney. Lewis Ruffner, out of his own resources, paid to Dickinson and Shrewsbury nine thousand three hundred and thirty-one dollars, on account of their deed of trust on the property; he also paid the debt of two thousand five hundred dollars, in which Tompkins and Donally were securities, and charged by deed of trust on the slaves; the debt being about the value of the slaves. These payments were made to prevent sales under the deeds of trust. There are other debts in which David Ruffner was security for Putney, some of which have been paid out of Ruffner's estate, and others of them remain

unpaid. The bill alleges that the property embraced by the deed from Putney to Ruffner, affords but a hazardous and uncertain security for the debts charged thereon, and that the complainants would not have entered into the agreement without the additional security afforded by the agreement of March 16th, 1842.

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The answer of Putney does not deny expressly that the property conveyed by him to Ruffner is insufficient as a security; he asserts, however, that he could have sold it to others at the time he sold to Ruffner, for money enough to have paid the debts then charged thereon and those assumed by Ruffner.

David Ruffner died, leaving the will herein before mentioned; which was admitted to probat in the County court of Kanawha county at the March term 1843. On the 1st of November 1844, Putney executed a deed of trust on the real estate devised to him by Ruffner to secure a debt of two thousand six hundred dollars due to Andrew Donally; and he also sold a portion of the estate to William D. Shrewsbury. These persons are made parties, and are charged with having acquired their interests with notice of the equitable rights conferred by the agreement of March 16, 1842; which charge they do not repel. The bill prayed an injunction, which was awarded, to restrain Putney from selling or conveying away the property devised to him as aforesaid; and that the interests acquired by Donally and William D. Shrewsbury respectively, may be postponed to the equitable charges imposed by David Ruffner on the property; and for general relief. Putney and Shrewsbury answered and moved to dissolve the injunction; on which motion the material facts appear as herein set forth. The motion was sustained; an order entered dissolving the injunction; from which order this appeal is taken.

The whole case turns on the question whether the

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property formerly belonging to David Ruffner, to which Putney, or Putney and wife in her right, succeed under the will, or by descent or distribution, is charged either primarily or secondarily with the liabilities assumed by Ruffner for Putney, or with other of Putney's debts for which David Ruffner was bound as security. If the property be so charged, whether immediately or contingently, the complainants have the right to prevent the alienation thereof, unless it be subject to the charge, as the property might thereby pass into the hands of purchasers for value without notice, and thus the charge be rendered of no avail.

The purposes of David Ruffner, disclosed in his will, and of David Ruffner, Lewis Ruffner and Henry Ruffner, disclosed in the agreement of March 16th, 1842, and their cotemporaneous exposition thereof, are perfectly manifest. Putney had become deeply embarrassed by his debts. Ruffner, his father in law, was willing to relieve him from a portion of those debts; that portion seems to have been selected with reference to the benefit of Ruffner's two sons, and for his own relief as security; the debts are all, or nearly all, such as the father or one of the sons was concerned in either as security or creditor. David Ruffner intended to subject the property acquired by the deed of March 12th, 1842, to the burden of paying his liabilities assumed by the agreement of that date; and further to charge those liabilities, and any other of Putney's debts for which he was bound as security, or that portion of his estate which he had intended to give to Putney, or Putney and wife. This, in effect, was merely to vary the form of the benefit intended for Putney; he will get all that was intended for him either by payment of his debts or in the property itself, or so much thereof as remains after discharging the liabilities imposed thereon.

Thus, whilst Putney receives all that was intended for him, the other objects of David Ruffner's care and

bounty, his wife and his other children, are secured to some extent, if not entirely, against having to give up a portion of the estate intended for them, to pay Putney's debts. The inherent justice of this arrangement commends it strongly to the favorable consideration of a court of equity; and there is no reason found in it for the earnest and impassioned invective by the appellees' counsel against the attempt to disinherit Putney and wife. The counsel seemed to have overlooked the obvious fact, that by permitting Putney to enjoy the whole subject devised to him or his wife without specific charge thereon, all David Ruffner's liabilities to or for Putney must be discharged out of the estate generally; and thus Putney's debts, in whole or in part, in effect, be paid by the other parties interested, especially by Ann Ruffner, the wife of the testator. I am clearly of opinion that the defense of the appellees, so far as it rests upon the supposed hardship of the arrangement, is without a shadow of foundation.

It only remains to enquire whether there is any other defect in the contract, which will prevent the court from giving it the effect intended. The principal if not the only objection in this aspect of the case, is the want of valuable consideration moving from Lewis Ruffner and Henry Ruffner. In reply it may be said that David Ruffner was under the obligation of his covenant to Putney to pay to the appellants a sum of money, with interest and costs, of about five thousand dollars. It was therefore perfectly competent for David Ruffner to make any arrangement with these creditors of Putney for the discharge of the debts; and it cannot be said that David Ruffner's contract was merely voluntary. The appellants, instead of exacting payment directly of Putney, or indirectly of Ruffner through Putney, agreed to await the slow process of procuring payment by means of equitable charges on portions of Ruffner's estate. Thus David Ruffner had a double consideration from the appellants.

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lants; one a large sum of money; the other the forbearance to collect it. Nor is this all. In consideration of the charges imposed by David Ruffner on portions of his property, the appellants bound themselves for an indefinite time, to give their labor and care to the personal and pecuniary relief of David Ruffner, in the management of the property committed to their hands. And this is a work of great magnitude. Whether the appellants could make any charge for their personal labor, care and diligence, is a question not free from doubt. See 1 Lomax Dig. 332; *Bonithon v. Horhmore*, 1 Vern. R. 316; *French v. Baron*, 2 Atk. R. 120; *Godfrey v. Watson*, 3 Atk. R. 517; *Langstaffe v. Fenwick*, 10 Ves. R. 405; 1 Powell on Mort. 295 b, Rand & Coventry's edition.

It is probable, that whilst the English rule of withholding any compensation for personal service under all circumstances, might not be adopted in all its rigor, yet in our courts it would be departed from only in cases in which circumstances might make it equitable to do so. The money expended by a mortgagee in possession for needful repairs of the mortgaged property, is chargeable thereon. 1 Lomax Dig. 333.

In the case before us the money was in fact expended; the utility of the expenditure is a subject for further enquiry. The money, nearly twelve thousand dollars of principal in amount, paid by Lewis Ruffner to relieve the property from the paramount liens thereon, clearly went to the relief of David Ruffner, and should be charged on the mortgaged subject.

Thus, we have before us a case in which a purpose is distinctly manifested, by the owner of property, to charge certain liabilities for which he is bound, upon specific portions of his estate, real and personal; this purpose is declared by covenant under seal, for a consideration of great pecuniary value.

The form of the deed and the nature of a portion of the property, are such that a charge is not imposed of

which the common law courts would take cognizance. The more comprehensive and beneficent jurisdiction of courts of equity, however, embraces the case, and may give full relief. Those courts have long recognized a species of security known as an equitable mortgage, and will give it the effect of a legal mortgage. Wherever it appears by writing, signed by a debtor, that he intends to charge his debt upon certain property of his own, courts of equity, at the instance of the creditor, will effectuate the intention. Nor is it material in what form of instrument the intention is expressed: mere promises, powers of attorney, deeds imperfectly executed, and other written papers, have been held to create equitable mortgages in the contemplation of courts of equity. Those courts, on the general principles of their jurisdiction, have always specifically executed such contracts. The law courts giving either no relief, or inadequate relief, for this reason the courts of equity have taken jurisdiction and given to the intentions of parties their full effect. See *Miller on Equitable Mortgages*, p. 1, 2, 3, 4, 5, 47 Law Libr.; *3 Powell on Mortgages*, (*Coventry & Rand's edition,*) p. 10-49 a, 6; 1650, &c.

Looking to the written evidence in the record, there is no doubt in my mind that David Ruffner intended to charge the debts mentioned in the deed of March 12, 1842, and other debts for which he was bound as security for Putney, upon the property conveyed by that deed, and also upon that portion of his estate to which Putney or Putney and wife might succeed under his will, by descent or distribution. That the property conveyed by the deed should be held as a primary security for the debts mentioned in the agreement of March 16, 1842, and the other property as a secondary security. Thus I am of opinion to reverse the order of the Circuit court dissolving the injunction and to reinstate that injunction.

In order to a full and final adjustment of the charges

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& others. on the property, it will be necessary to amend the bill making the personal representative of David Ruffner's estate, Ann Ruffner, the wife of Richard E. Putney, Moses M. Fuqua and wife, and the creditors whose debts are charged on the property, or any part of it, parties defendants.

DANIEL and MONCURE, Js. concurred in the opinion of SAMUELS, J.

ALLEN, P. and LEE, J. dissented.

The decree was as follows:

The court is of opinion, upon the facts as they now appear in the record, that the property, real and personal, conveyed by the appellee Putney to David Ruffner, by the deed bearing date March 12, 1842, and also the estate, real and personal, formerly belonging to David Ruffner, and to which Putney, or Putney and wife in her right, succeed by devise, bequest, descent or distribution, are chargeable with the debts recited as due from Putney, and assumed by David Ruffner by the deed aforesaid, and any other debts due from Putney for which David Ruffner was security on the 16th of March 1842.

The court is further of opinion, that both parcels of property are also chargeable with any money expended by Lewis Ruffner and Henry Ruffner, or either of them, in relieving the property, or any part thereof, from paramount liens thereon, and for any money expended in needful repairs, and for all proper expenses incurred in prosecuting the work contracted for by the agreement of March 16, 1842.

The court is further of opinion, that Lewis Ruffner and Henry Ruffner, or either of them, will not have the right to make any charge for personal service, care and diligence, under their contract of March 16, 1842, unless in the further progress of the case it shall appear equitable to allow such charge.

The court is further of opinion, that the charges herein before declared to be proper shall be credited by the gross proceeds resulting from the prosecution of the work contracted for by the agreement of March 16, 1842, and the balance, if found against the appellee Putney, shall be charged primarily upon the property conveyed by the deed of March 12, 1842, and secondarily on the property to which Putney, or Putney and wife in her right, succeeded after the death of David Ruffner.

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The court, regarding the rights of the parties as having been such as hereinafter declared at the time the injunction was dissolved, and being of opinion that the injunction was necessary to preserve those rights, is therefore of opinion, that the order dissolving the injunction is erroneous.

It is therefore adjudged, ordered and decreed, that said order be reversed and annulled; and that the appellants recover of the appellees their costs in this court expended.

And the court, proceeding to make such order as the Circuit court should have made, it is further ordered, that the motion to dissolve the injunction be overruled; and further, that complainants shall amend their bill making parties the personal representatives of David Ruffner, and Ann Ruffner, the wife of Richard E. Putney, Moses M. Fuqua and his wife, the daughter of David Ruffner, and those creditors not already before the court whose debts are charged upon the property or any part of it, to the end that a full and final adjustment and payment of the charges may be made. And the cause is remanded to be further proceeded in according to the principles herein declared, to be varied only by such facts, hereafter made to appear, as may, according to the principles of equity, require a different rule of decision.

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1. Certain legal questions are submitted by parties to a controversy: to an arbitrator, and they agree to be bound by his award. Upon a suit being afterwards instituted by one of the parties against the other in relation to the subject matter of the submission, the award of the arbitrator deciding the questions submitted to him, is the law of the case.
2. Testimony in relation to the correctness of the copy of a paper, is not admissible, unless the absence of the original paper is accounted for.
3. To prove the authority of an agent, the ~~parol~~ directions of the principal to him may be given in evidence.

This was an action of debt on a bond for four hundred and thirty-five dollars, bearing date the 14th of May 1835, brought by James M. Smith against Thomas Lunsford. Issue was made up on the plea of payment, and by consent of parties it was entered of record, that under his plea the defendant might make any defense which he could make under any plea which he could file either under the common law or the act of assembly. Under this state of the record a trial of the cause was had, and there was a verdict and judgment for the plaintiff; which upon appeal was reversed by this court, on the ground that the court had improperly excluded evidence offered by the defendant which went to establish a good defense to the action which might have been set up under the act of April 6th, 1831, Sup. Rev. Code, p. 157.

When the cause went back, it was removed to the Circuit court of Montgomery county, where it came on again to be tried in May 1847: On this trial the defendant took three bills of exception. The first set

out the evidence in the cause; and it appeared, that by deed bearing date the 12th of January 1825, Joseph H. Jett conveyed to John F. Sale four slaves described as then in the possession of Jane Harding, in the county of Northumberland, in trust to secure a debt due to William Terry, and for the indemnity of Terry as his surety. This deed was executed in the county of Bedford, and was acknowledged by the parties before the clerk of the County court of Bedford; and on the 24th of January it was produced in court and ordered to be certified to the County court of Northumberland. Upon the certificate of this order by the clerk, it was on the 13th of June 1825, ordered by the latter court to be admitted to record.

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On the 14th of April 1825 an execution in the name of James M. Smith, executor of James Smith, against William Jett, Thomas Hughlett and Joseph H. Jett, for seven hundred dollars and sixty-nine cents, was put into the hands of the sheriff of Northumberland. This execution was levied on several slaves, the property of Joseph H. Jett, and among them two of those embraced in the deed to Sale. In these slaves Jane Harding had an estate for her life, and she lived until 1834. Jett's interest in the slaves was sold, however, and was purchased by James M. Smith. Another of the trust slaves was purchased of Jett in 1830 by G. H. Foushee.

Upon the death of Jane Harding, the trustee, at the instance of Thomas Lunsford, who had acquired Terry's interest under the deed of trust, advertised the slaves embraced in the deed of trust for sale; and the parties having met in Northumberland, they agreed to submit their rights to the award of the late Benjamin Watkins Leigh; and a statement of facts was drawn up by their counsel substantially as herein before stated; and it was added that Smith expected to prove that Jett verbally gave up his interest in the

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Smith. two slaves in which Jane Harding had a life estate, to the sheriff, to be sold under Smith's execution: And they then submitted to Mr. Leigh several questions, the third and fourth of which are as follows: Third. Was the said Jett's interest in said slaves such property as may be seized and sold under an execution of *fieri facias*? Fourth. Is the said property still liable under the said deed of trust? And if the last question is decided against the said Smith, then if it be proved that the said Jett gave up his interest in the said slaves to be sold under the execution aforesaid, is such sale under such circumstances valid or not?

At the time this agreement for the submission to the award of Mr. Leigh was made, Lunsford purchased the slaves of Smith, and executed to him a bond for four hundred and thirty-five dollars, the amount of his claim under the deed of trust, upon the agreement that if Mr. Lee decided in his favor, the bond was not to be paid; but if the decision was in favor of Smith, then it was to be valid, as for so much of the purchase money of the slaves: The balance of the purchase money was paid.

Mr. Leigh made his award, by which he decided that the interest of Jett in the slaves was not such an interest as could be taken on a *fi. fa.* against Jett. But he further decided that if it could be proved that Jett gave up his interest in the slaves to be sold under the execution, that would give validity to the sale, and perfect the title of the purchaser. That the interest might be sold by Jett, and he might give up his interest to the sheriff to be sold by him, and the sheriff would then act as his agent: that the purchaser at the sheriff's sale would claim as a purchaser under Jett; that the deed of trust not having been properly recorded was not notice to the purchaser; and that actual notice of the deed was necessary to give the party claiming under the deed priority over him. But

that the want of due registry would not impair the validity of the deed as against creditors whose debts have not attached upon the subject by force of legal process.

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After the award was made Smith instituted this action, and the defendant relied upon his title under the deed of trust and the award of Mr. Leigh. Thereupon the plaintiff introduced evidence to prove that Jett gave up his interest in the slaves to the sheriff to be sold under the execution; and for that purpose introduced the deposition of John H. Jett. The second, fifth and next to the last questions and answers thereto, were objected to by the defendant's counsel. The questions and answers are as follows:

2d. "You say these slaves were sold under an execution in favor of J. M. Smith v. William Jett, Thomas Hughlett and Joseph H. Jett. Do you think that the paper marked A is a copy of the said execution?" Answer. "I think it is. I never heard of Mr. Smith having any other execution against them."

5th. "State whether you heard any directions given by Joseph H. Jett to Richard Hughlett, deputy sheriff, in relation to the slaves. If so, state what they were and at what time." Answer. "I heard Joseph H. Jett tell Richard Hughlett, the deputy sheriff, to take the slaves and other property, and advertise and sell the reversionary interest which he had in the slaves to satisfy the execution before referred to. He gave up to the sheriff all the property he owned of every description."

"You say above that the sheriff sold (the slaves) in his character of sheriff. Did he state at the time that he sold only the remainder interest in them, and that he did so by direction of Joseph H. Jett?" Answer. "I was not present at the time the said negroes were cried off by the sheriff, and cannot therefore say with certainty in what character he sold them; but as I had

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heard Joseph H. Jett direct him to advertise and sell his interest in them, I suppose he sold them as sheriff of the county, and they were advertised with the other property of Joseph H. Jett to be sold."

The court overruled the objection to these questions and answers; and the defendant excepted.

After all the evidence in the cause had been introduced, the defendant asked the court to give three instructions to the jury: First. That if it should appear to the jury from the evidence in the cause, that Joseph H. Jett duly executed and delivered the deed of trust to Sale; and if it should further appear to them from the testimony, that the said deed of trust has never been recorded, yet the want of due registry of said deed will in no wise impair its validity against creditors whose debts have not attached upon the slaves by force of legal process.

Second. That if it should appear to them from the testimony in the cause, that Jett's interest in the slaves aforesaid was a vested remainder expectant on the life of Miss Harding, that then the levy of the execution in this case on the said slaves as the property of the remainderman, was illegal and void; and a purchaser of them under a sale made by the sheriff as sheriff, passes no right to the purchaser. There was no evidence in the record to which the third instruction asked was applicable.

The court refused to give any of the instructions asked by the defendant; and he again excepted.

The plaintiff then moved the court to instruct the jury as follows: If the jury believe from the evidence in this cause, that the execution which has been given in evidence was levied upon the remainder interest of Joseph H. Jett in the said slaves, by the sheriff of Northumberland county, and that said remainder interest was sold by the said sheriff under said execution, by the directions of said Jett, to the plaintiff, such

sale vested a valid title of the remainder interest of 1855.
said Jett, to the said slaves in the plaintiffs, and the July
jury ought to find for the plaintiff. This instruction Term.
the court gave; and the defendant again excepted. Lunsford
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There was a verdict and judgment for the plaintiff Smith.
for the amount of the bond, with interest from its date;
whereupon the defendant applied to this court for a
supersedeas; which was awarded.

Baxter, for the appellant.

J. T. Anderson, for the appellee.

ALLEN, P. This case has already been before this court. On that occasion it was decided, that under the agreement of the parties to give any matter in evidence under the plea of payment which the plaintiff in error might plead, either at common law or under the statute, it would have been competent to have pleaded by way of set-off under the act of April 1831, Sup. Rev. Code 157, the facts which the evidence offered on that occasion tended to prove, and therefore that the court erred in rejecting such testimony.

Upon the second trial the evidence was again offered and admitted; and the case comes up now on an exception to a decision overruling a motion of the plaintiff in error to exclude portions of the deposition of John H. Jett; and to the refusal of the court to give three instructions asked for by the plaintiff in error; and to giving an instruction at the instance of the defendant in error. This court having held that under the agreement of the parties it was competent for the plaintiff in error to offer evidence tending to prove that the parties had agreed to refer the questions of law arising out of the controversy between them to the decision of Mr. Leigh, that said questions were so referred and were decided in favor of the plaintiff in error, his decision, according to the former judgment of this court, constitutes the law of the case.

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Mr. Leigh determined, 1st. That the deed of trust under which the plaintiff in error asserted a right to subject the slaves conveyed by the deed of trust to sale for the payment of his debt, had not been duly recorded, so as to make it good against the creditors of the grantor. "But that the want of due registry would in no wise impair the validity of the deed as against creditors whose debts have not attached upon the subject by force of legal process." 2d. That a remainder or a reversion of a personal chattel is not such an interest as can be taken on a *fi. fa.* against the remainderman or reversioner. And therefore it followed that the execution, under which the levy was made and the property sold to the defendant in error, did not authorize such levy in 1825, and could not sanction it at the time the decision was made, as that process was then *functus officio*. 3d. That as the remainderman could sell the property himself, if it could be proved that he gave up his interest in the slaves to be sold under the execution, this would give validity to the sale, and perfect the title of the purchaser.

After the testimony had been offered and read, the plaintiff in error moved the court to give three instructions to the jury, which the court refused to give; and he excepted. I think the court properly refused to give the third instruction as irrelevant; there being no evidence proving, or tending to prove, that the defendant in error had actual notice of the said deed of trust, at or before his purchase of the slaves at the sale made by the sheriff. But I can perceive no objection to the first or second instructions. Each was founded upon the decision of Mr. Leigh, and was pertinent to the issue the jury was trying. The first asked the court to instruct the jury that the want of registry of the deed of trust did not impair the validity thereof against creditors whose debts had not attached on the slaves by force of legal process. And

by the second, the court was asked to instruct the jury, that if it appeared that the interest levied on was a vested remainder expectant upon a life estate, the levy of the execution on said slaves as the property of the remainderman, was illegal and void, and a purchase of them under a sale made by the sheriff, as sheriff, passed no right to the purchaser. Each of these propositions was settled by Mr. Leigh's decision in the affirmative; and whether sound law or not, as a general question, was the law of the case as settled by the referee. How far the effect of these legal propositions so settled would be controlled by another portion of his decision upon other facts, if proved, or whether the evidence tending to prove such other facts did prove them, were distinct and independent questions.

The plaintiff in error controverted the fact of a sale by the sheriff under the execution by the directions of the remainderman. There was parol proof, and there was the sheriff's return bearing upon this point; and the jury were to decide from all the facts in evidence before them, whether the purchaser at the sheriff's sale could claim as a purchaser under the remainderman himself. By the instruction given at the instance of the defendant in error, the jury were instructed, that if they believed from the evidence that the execution had been levied on such remainder, and that the same was sold by the sheriff under the execution by the directions of the remainderman, such sale vested a valid title to such remainder in the purchaser. This instruction, like the others asked, was predicated on the decision of Mr. Leigh, and though somewhat obscure in not sufficiently distinguishing between a sale made by the sheriff as officer only, and a claim under such official act alone, and a claim as a purchaser under the remainderman himself, in consequence of his giving up his interest in the property to the sheriff to be

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1855. sold, who in that case might be regarded as his agent
July to sell under the execution; yet I regard the instruc-
Term. tion as substantially complying with the terms of the

Lunsford decision of Mr. Leigh. But it applies to but one
v. Smith. branch of the case. The jury may not have believed
that the facts were proved to which the instruction
applied. And yet by the refusal of the court to give
the instructions asked by the plaintiff in error, they
may have concluded that the want of registry im-
paired the validity of the deed of trust against credi-
tors, although their debts had not attached on the
slaves by force of legal process; or that a *fi. fa.* could
be levied on such a remainder expectant on an estate
for life, and a sale made by the sheriff in virtue of the
execution would pass the title to the purchaser. We
cannot say that they did not find their verdict upon
some such conclusion; which would have been di-
rectly against the law of the case as settled for the
parties by Mr. Leigh, and subject to whose decision
the note sued on was given. If the defendant in error
had supposed that the instruction, unconnected with
that part of the decision which related to a sale by the
sheriff by the directions of the remainderman, was
calculated to mislead the jury, he could have moved
the court to qualify it, by giving as an addition what
in fact at his instance was given as an independent
instruction. If all had been given, the whole of the
legal questions propounded to and decided by Mr.
Leigh would have been fairly before the jury. I
think the court erred in refusing the first and second
instructions asked for by the plaintiff in error; but
that the third instruction asked for by him was pro-
perly refused, and that the instruction given at the
instance of the defendant in error was substantially
correct.

In regard to the deposition of John H. Jett, parts of
which were excepted to, it seems to me the objections

to the fifth interrogatory and the last interrogatory propounded but one, and the answers to said interrogatories were properly overruled. The question, and a most material one under the decision of Mr. Leigh, was whether the remainderman gave up his interest in the slaves to be sold by the sheriff under the execution: and evidence of his directions before the sale, is the best if not only evidence to be adduced to prove the fact. I think, however, the court erred in overruling the objection to the answer to the second interrogatory. He was asked whether a paper shown to him marked A, was not a copy of the execution under which he had, in a previous answer, said the slaves were sold; to which he replied that he thought it was; he had never heard of the defendant in error having any other execution against the parties named. The paper is not filed. We do not know whether it was an official copy or a copy by some other person; and it was improper to give evidence of a copy without some account of the original.

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I think the judgment should be reversed with costs to the plaintiff in error, the verdict set aside, and the cause remanded with instructions to award a new trial; and upon such new trial to exclude from the jury the second interrogatory and answer thereto in the deposition of John H. Jett, if again objected to; and if the same evidence is again adduced, to give to the jury the first and second instructions asked for by the plaintiff in error and refused, provided he again should ask the court to give the said instructions to the jury.

The other judges concurred in the opinion of **ALLEN, P.**

JUDGMENT REVERSED.

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September 7.

1. Under what circumstances it is error to refuse a continuance of a cause.
2. A subject and citizen of Great Britain purchased land in Virginia in 1793, and he lived until 1818. By the treaty of 1794 between Great Britain and the United States, he was entitled to hold the land; and no proceedings having been instituted during the war of 1812 to escheat it, that war did not divest his rights, but the land descended on his death to his heirs.
3. In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to a deed to the alien for the land, as recorded in the county of K, an office copy of said deed is evidence for the heirs, though it was not recorded upon proper proof.

On the 12th of March 1831, an inquisition was taken before the escheater of Cabell county; and the jury having been charged to enquire what lands and tene- ments John Fiott, late of the city of London and kingdom of Great Britain, merchant, now deceased, died seized of; whether he left any heirs, or made other disposition of said lands in his lifetime; and whether the said John Fiott was an alien at the time of his death; they found that the said John Fiott, late of the city of London, long before his death, was seized of a tract of land lying in the county of Cabell, containing about eight hundred acres, being part of a tract containing two thousand and eighty-four acres, conveyed to the said John Fiott by Charles Vancouver; as by deed dated the 27th day of July 1793, now of record in the County court of Kanawha county, would more fully appear; and being so seized, the said John Fiott, on the day of 1818,

died; he the said John Fiott at the time of his death being an alien.

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This inquisition was returned into the Circuit court of Cabell county; and at the April term 1833 of that court, John Fiott, John Ede and Philadelphia his wife, John Vaughan and Charles Vaughan, who claimed a freehold in the said lands, appeared by their attorney, and after craving oyer of the inquisition, filed a demurrer thereto, in which the attorney for the commonwealth joined. They also filed their traverse of the office found; and time was allowed the attorney for the commonwealth to reply or demur thereto. And it was ordered that the excheator of Cabell county be summoned to appear on the first day of the next term, to defend the rights of the commonwealth.

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At the September term 1833 of the court, an order was made authorizing the traversers to take depositions in or near the city of London, before the American consul at London, or the secretary of legation of the United States. At the September term 1836, the attorney for the commonwealth had leave to withdraw his joinder in the demurrer; and on his motion, the said demurrer was stricken out, as having been improvidently received. The plaintiffs then moved for leave to withdraw their traverse; and in lieu thereof to file their *monstrans de droit*, which was allowed; and the attorney for the commonwealth took time to plead, reply or demur; and the cause was continued. At the next term of the court the plaintiffs were allowed to withdraw from the papers their *monstrans de droit*, and file an amended one; and the attorney was allowed until the first day of the next term to plead, reply or demur. At the next term of the court the attorney for the commonwealth craved oyer of the deed of conveyance from Charles Vancouver to the said John Fiott, whereof mention was made in the *monstrans de droit*, and demurred generally to the *monstrans de droit*;

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and the plaintiffs joined in the demurrer. The cause was from thence regularly continued until the May term 1839, when the plaintiffs had leave to withdraw their joinder in the demurrer; and also to withdraw the paper of which ~~oyer~~ had been craved by the attorney for the commonwealth, and to file in lieu thereof the parchment copy purporting to be the original conveyance of the 27th of July 1793, from Vancouver to John Fiott, Charles and John Vaughan. And the attorney for the commonwealth had leave until the next term to change the pleadings on her part, so far as he might deem it necessary by reason of the substitution aforesaid.

The *monstrans de droit* as amended, after insisting that the inquisition of escheat was insufficient in law, sets out that John Fiott and Ede and wife are the heirs at law of John Fiott deceased, and as such capable of taking and holding the land in the inquisition mentioned; and that Charles and John Vaughan are citizens of the United States. That it is not true, as stated in the inquisition, that the land was, on the 27th of July 1793, conveyed by Vancouver to John Fiott deceased; but that it was conveyed to him and said Vaughans. That it is not true that Fiott was seized of the land; but that he and the Vaughans were jointly seized. And that it was not true that at the time of the death of John Fiott he was such an alien, within the meaning of the laws and treaties of the United States and the laws of Virginia, as to be incapable by reason thereof to hold lands in any of the United States; but that he was at the time of acquiring seizin of said lands, and up to the time of his death, a citizen of London in England, and a subject of the king of Great Britain, and that by the treaties between that king and the United States, the rights and interests of the said John Fiott were preserved to him, and his claim to seizin of said lands recognized

and declared to be good and valid. And they further averred that John Fiott died after the ratification of the treaty of 1794, and that he left at his death the plaintiff's John Fiott, and Philadelphia Fiott who intermarried with John Ede, his children and lawful heirs, capable of inheriting said lands; and to whom the said lands descended, and in whom the title was vested on the death of said Fiott, and remained vested in them in common with the said Vaughans, at the time of the pending of the inquisition aforesaid.

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At the October term 1839, the attorney for the commonwealth withdrew his demurrer, and replied generally to the *monstrans de droit*, and issue was thereupon joined; and by consent the cause was continued. At the April term 1840, the death of Charles Vaughan was suggested; and in December a *scire facias* was issued to revive the suit in the name of his heirs: And at the April term 1841, the suit was revived. At the April term 1842, the death of John Vaughan was suggested, and in May a *scire facias* was issued to revive the suit in the name of his heirs; and at a special term in November the suit was revived.

At the April term 1843, the plaintiff's moved for leave to amend their *monstrans de droit*, which was refused; and the cause was continued at their costs; but with the express notice to them and their counsel, that after the unexampled delays in preparing the cause for trial, no further continuance could take place on account of the absence of Apperson, their agent, or for the failure to take the necessary depositions, or to have proper parties before the court. And if unfortunately a continuance should be again asked for, it must be supported on strict legal grounds, fully verified by affidavits, and accounting for past neglects.

At the April term 1844, it was ordered that the attorney for the commonwealth do appear here on the next Wednesday to show cause why the inquisition

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should not be quashed for errors apparent on its face. At the September term an order was made discharging the rule; and the plaintiffs excepted. And in October 1846, by consent, other commissioners were authorized to take the depositions in London.

In April 1847, the cause was called for trial, when the plaintiffs moved the court for a continuance, which was refused; and they excepted. The case was then tried, and there was a verdict and judgment for the commonwealth; the court having overruled a motion for a new trial.

Upon the motion to quash the inquisition, the plaintiffs, after deducing the title to the land from the patent by regular conveyance to Vancouver, introduced a deed bearing date the 27th of July 1793, from Vancouver to John Fiott and Charles and John Vaughan, conveying the land to them, from which it appeared that Fiott paid for the land, and the Vaughans only took in trust for him. The acknowledgment of this deed is certified by James Sanderson, styling himself lord mayor of London, but there is no seal to it. They proved that Charles and John Vaughan were citizens of the United States, and the parties in whose names the suit was revived are their heirs. They also offered to introduce two depositions taken upon interrogatories, before the American consul at London, at the time but not at the place designated in the notice, for the purpose of proving that the plaintiffs John Fiott and Philadelphia Ede were the children and heirs of John Fiott deceased; that Philadelphia was married to John Ede, and that John Fiott the elder died in 1818: And the proof is conclusive if true, of which the record shows no reason to doubt. These depositions were taken in February 1844. But the attorney for the commonwealth objected to the depositions, on the ground that they were not taken at the place designated in the notice; and the court sustained the objection, and refused to read them.

On the motion for a continuance of the cause, the plaintiffs proved, to the satisfaction of the court, that Mr. Apperson, who was the agent of the plaintiffs, lived in Mount Sterling, Kentucky; and that directly after the last term of the court, the counsel for the plaintiffs, who lived in Charleston, Kanawha, wrote to him to make arrangements to have the London depositions retaken, and that Apperson did not answer said letter. That the counsel was absent from home for six or eight weeks, but again wrote to Apperson early in January 1847, apprising him that one hundred dollars had been placed in the hands of Prime, Ward & King of New York, to obtain a bill on London to defray the expenses of taking the depositions (this being the cost of taking the two depositions in London;) and that said counsel immediately gave notice to the escheator of Cabell that the depositions would be taken at a certain place in London on the 27th of March 1847, and had taken the other necessary steps to have the depositions taken: but if taken, they had not arrived.

They also offered the depositions of the same witnesses twice taken in this cause, which the attorney for the commonwealth had apprised the counsel of the plaintiffs he would object to being read on the trial of the cause; and they offered that if the attorney would agree to the reading of either of the said depositions, they would go to trial; which offer the attorney rejected.

It was also known to the court that the cause had been continued before the last term, that the plaintiffs might take these depositions; and that at the last term the court refused to continue the cause any longer for the purpose of taking the depositions; but it being suggested that the counsel for the plaintiffs had some important papers in the cause which he had forgotten and had left in Kanawha, the court laid it over until the last Friday of the term; but when that

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1855. day arrived, the court was occupied in a cause which
July took up the balance of the term. And upon this state
Term. of facts, the court refused either to continue the cause

Fleet & als. or to pass it until the latter part of the term, in order
v. to see whether the depositions might not arrive during
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On the trial of the cause the plaintiffs having traced the title under which they claimed from the patent to Charles Vancouver, then offered in evidence an original deed from Vancouver to John Fiott, Charles and John Vaughan, bearing date the 27th day of July 1793, and purporting to be acknowledged before James Sanderson, lord mayor of London. The certificate was without seal; and though it stated that he was lord mayor of London, there was no other evidence of the fact. The attorney for the commonwealth objected to the introduction of the deed as evidence, on the grounds that there was nothing to show that Sanderson was lord mayor of London, and because the deed was not a recorded deed in Virginia. The defendants then produced to the court an order of the County court of Kanawha, made July 7th, 1794, directing a deed from Vancouver to Fiott and the Vaughans to be admitted to record, and also an office copy of the deed, and asked the court to examine the order and deed, and decide whether it had not been recorded in Virginia; which examination the court made, but was not satisfied that it was the same deed, because of some discrepancies between the original deed offered and the copy produced, and excluded the deed from the jury.

The plaintiffs then proved that John and Charles Vaughan resided in the United States, and that the persons in whose names the suit was revived were their heirs. And they thereupon moved the court to quash the inquisition for errors apparent upon its face: which motion the court overruled.

The plaintiffs then asked for instructions, which were refused; but it is unnecessary to state them.

After the verdict was rendered, the plaintiffs asked for a new trial, on the ground that they were improperly forced into trial; and of surprise by the rejection of the deed offered in evidence by them. But the court overruled the motion; and they excepted. On the application of the plaintiffs, this court granted a *superse-
deas to the judgment.*

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Price and Fisher, for the appellants, insisted:

1st. That the inquisition should have been quashed, because it did not respond to the enquiry whether John Fiott left heirs. The inquisition found that he was a subject of the King of Great Britain; and he was therefore upon this question to be so considered. And under the treaty of 1794 between Great Britain and the United States, his heirs were enabled to inherit land in Virginia. See the 9th clause of the treaty, 2 United States Laws, p. 476; *Blight's lessee v. Rochester*, 7 Wheat R. 535; *Harden v. Fisher*, 1 Id. 300; *Hughes v. Edwards*, 9 Id. 489; *Craig v. Radford*, 3 Id. 594; *Orr v. Hodgson*, 4 Id. 453; *Inglis v. Trustees Sailor's Snug Harbor*, 3 Peters' R. 99; *Shanks v. Dupont*, Id. 242; *State of Georgia v. Brailsford*, 3 Dall. R. 1; *Jackson v. Wright*, 4 John. R. 75; *Stephens v. Swann*, 9 Leigh 404; *Hubbard v. Goodwin*, 3 Id. 492; 1 Tuck. Com. 66. The land having descended to the heirs, and they being entitled to hold, it could not be escheated on account of the alienage of John Fiott.

2d. That the original deed from Vancouver to Fiott was certified by the lord mayor of London, and was properly authenticated to make it evidence; and therefore it was error to exclude it on the trial. *Cales v. Miller*, 8 Gratt. 6; *Hassler's lessee v. King*, 9 Gratt. 115. Moreover, it was expressly referred to in the inquisition as having been recorded in the county of Ka-

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nawha; and it was upon that deed thus recorded, that the inquisition found that John Fiott had been the owner of the land, and based the escheat.

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3d. That the depositions which had been taken and were objected to by the attorney for the commonwealth, clearly showed that the plaintiffs John Fiott and Philadelphia Ede were the only children and heirs at law of John Fiott the elder; and under the circumstances it was error to compel the plaintiffs to go into the trial before the depositions had been again taken.

The *Attorney General* for the commonwealth, insisted:

1st. That if the inquisition was insufficient in law on its face, it passed no title to the commonwealth; and therefore it was unnecessary to quash it: If sufficient on its face, it should not have been quashed.

He insisted further, that the inquisition was sufficient. That there were two causes for which lands would escheat: One, when a citizen dies without heirs; the other, when an alien dies. An alien may hold lands against all persons, and against the commonwealth until office found. But when he dies his land does not descend to his heirs, but it becomes at once the land of the commonwealth without an office found; and the office is only necessary to ascertain the fact. When therefore the inquisition found that John Fiott was an alien, it was unnecessary to enquire or find whether he left heirs.

He insisted further, that by the treaty of 1794 an alien heir might inherit lands, that was an exception to the general rule, and need not be found by the inquisition, but should be set up by the party claiming the benefit of the exception in his *monstrans de droit*. This is the principle applicable to pleadings generally, and there is nothing in the statute in relation to escheats to change it. 1 Rev. Code of 1819, p. 353. See *Hill's Case*, 5 Gratt. 682.

He further submitted, whether the treaty applied to persons who purchased land in this country after the peace of 1783; and whether it was not confined to those who held lands prior to that time, and adhered to England. All the cases he had seen related to the latter class of persons; unless perhaps the title of Denny Martin to Lord Fairfax's lands.

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He further insisted, that the treaty of 1794 was terminated by the war of 1812. Vattel, book 3, § 175; Id. book 4, § 8. That the treaty of Ghent did not restore this provision of the treaty of 1794, upon which the plaintiffs relied; and John Fiott having died in 1818, his heirs could not inherit from him in Virginia.

2d. He referred to the proceedings in the cause, and the great delay which had occurred in the trial of the cause, to show that the court properly required the parties to proceed to try the cause.

3d. That the deed was not properly certified to render it admissible either as evidence or to record. To do either, it must have been certified in the usual manner in which deeds were certified by the lord mayor of London. Deeds are required to be acknowledged before a court or chief magistrate of a city, because they have seals, and are accustomed to authenticate deeds and other papers. And there is no case in our courts in which it has been held that a certificate of a mayor or other chief magistrate of a city was good without a seal. In *Hassler's lessees v. King*, the certificate was under seal, and therefore it was presumed to be in the usual form.

ALLEN, P. It seems to me that under the circumstances of this case, and the facts certified by the court, as having been proved in support of the motion for a continuance made by the plaintiffs at the May term 1847, that the court erred in overruling the motion and

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forcing them into a trial. The proceeding commenced in April 1833; but the issue on which the cause was tried was not made up until the October term 1839. For this delay the commonwealth was as much responsible as the plaintiffs. The time from 1840 until the November term 1842 was occupied in efforts to revive in the names of the representatives of two of the plaintiffs whose death had been suggested. At the April term 1843 the plaintiffs, upon affidavit, obtained a continuance, but were warned by the court that no further continuance would be granted unless the application should be supported on strict legal grounds. The cause was afterwards continued generally until the April term 1844, when a rule was awarded against the attorney for the commonwealth, returnable at the same term, to show cause why the inquisition should not be quashed. The cause stood upon this rule, perhaps for advisement, and was regularly continued until the spring term 1846, when the rule was discharged, as appears by an entry made at the fall term 1846; and at that term an agreement was made that depositions might be taken in London, before certain officers therein named. At the succeeding term held on the 3d of May 1847, the trial was had. From this statement it would seem that although the cause had not been prosecuted with much diligence, the delays were not altogether attributable to the plaintiffs. But there are other facts showing that they were making efforts to prepare for a trial. It seems that on the 8th day of July 1841, they took in London the depositions of two witnesses upon notice, before the American consul. The depositions were taken on interrogatories at the time, but it appears from the consul's certificate they were not taken at the place mentioned in the notice; and for this reason were objected to by the attorney for the commonwealth.

The depositions of the same witnesses were re-

taken, and the same error was committed; the American consul certifies that they were taken on the first day of February 1843 at his office in the city of London, being the day, but not the place, mentioned in the notice. To the reading of these depositions the commonwealth's attorney apprised the plaintiffs' counsel he would object. The plaintiffs again, through their agent residing in the state of Kentucky, proceeded to take steps to have the depositions retaken the third time. The sum of one hundred dollars was placed in the hands of persons in New York to obtain a bill on London to defray the expenses of taking the depositions, that being the real cost of taking the two depositions in this cause in London; and notified the attorney for the commonwealth that the depositions would be taken in the city of London on the 27th March 1847. But the depositions, if taken under this notice, had not arrived in this country, or been received by the clerk of the court on the 27th of April 1847, when the cause was called for trial. It further appears from the facts certified, that some delay occurred between the October term 1846 and the April term 1847, in giving the notice and taking the necessary steps to take the depositions, owing to the fact that it was necessary to correspond with the agent of the plaintiffs who resided in Kentucky, and the absence of their attorney from his home in Kanawha county for six or eight weeks of the time. Still it would seem that notice was given to take the depositions in time to have received them by the most expeditious mode of communication between this country and England. Whatever may have been the negligence of the parties prior to the October term 1846, they seem to have proceeded with reasonable diligence after the agreement at October term 1846. Their agent resided in another state, and some time would necessarily be consumed in corresponding with

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him, and in providing the means for taking depositions in England. Applications for continuances are addressed to the discretion of the court, and much must be left to the tribunal which has the parties before it, and must determine from a variety of circumstances occurring in its presence whether applications for continuances are made in good faith, or are merely intended to protract the controversy: And even when made in good faith, a reasonable degree of diligence should be exacted. The opposite party should not be kept in court and exposed to the risk of losing his testimony by the negligence of the other side.

But in this case it does not appear that the commonwealth could be subjected to any inconvenience by a delay for a term. Under the inquisition, if regularly returned and recorded, she was entitled to the possession. The inquest of office is her evidence of title. On this she rests; her right to the land cannot be controverted by any person who does not show an interest in the subject. According to our statute, as expounded by this court in the case of *French v. The Commonwealth*, 5 Leigh 512, the parties suing out the *montrans de droit* are plaintiffs, and must show a good right to the subject. Until they show their interest, they cannot be heard in opposition to the right of the commonwealth, as ascertained by the office found. And it does not appear that she was in a condition to suffer any injury from the loss of testimony or otherwise, by continuing the cause. That the application was made in good faith, is manifest from the previous efforts of the plaintiffs to procure this testimony at a considerable expense, and the sum expended to retake the depositions the third time; and from the offer made at the time to go into the trial, if the attorney for the commonwealth would waive the objection to the depositions.

The materiality of the testimony, if credited, is

clear. The inquisition finds that John Fiott, late of the city of London, long before his death was seized of the tract of land in Cabell county, containing about eight hundred acres, part of a tract of two thousand and eighty-four acres conveyed to said John Fiott by Charles Vancouver, as by deed dated the 27th of July 1793, now of record in the County court of Kanawha county, will more fully appear; and being so seized, that he died in 1818, being at the time of his death an alien: and that he had made no disposition thereof in his lifetime.

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The depositions prove that John Fiott was a subject of the king of Great Britain: that he died in England in 1818, leaving John and Philadelphia, two of the plaintiffs, his children and heirs.

The inquisition shows that John Fiott acquired title to the land by a conveyance from Vancouver, dated in July 1793, and recorded in the County court of Kanawha county. An alien may take by purchase. The conveyance clothed him with the title, and no inquest or office found divested him of the title before his death. The title thus vested in him was confirmed by the ninth article of the treaty of 1794; and upon his death in 1818, descended to his children and heirs.

It does not appear that any attempt was made to confiscate the property or divest the title of the heirs by office found during the war of 1812, or since. It is therefore unnecessary to enquire what would be the effect of the war upon such rights.

But it has been determined by the Supreme court that the termination of a treaty by war does not divest rights of property already vested under it. *Society for fc. v. New Haven*, 8 Wheat. R. 464. *Fox v. Southack*, 12 Mass. R. 143.

Upon the exhibition of the proof contained in the depositions, the said heirs would be entitled under the authority of *Hannon v. Hannah*, 9 Gratt. 146, to ex-

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I think the judgment should be reversed, and the cause remanded for a new trial.

The other judges concurred in the opinion of ALLEN, P.

JUDGMENT REVERSED.

Lewisburg.HUTSONPILLER'S *adm'r v.* STOVER'S *adm'r.*1855.
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1. Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and a day from the dissolution of the injunction without a *scire facias*, though the injunction was in force for more than ten years.
2. The statute of limitations to judgments does not run whilst an injunction to the judgment is pending.
3. If the defendant in a judgment dies whilst an injunction to the judgment is pending, though the injunction may not be dissolved for more than five years after his death, the statute requiring judgments to be revived within five years does not run during the pendency of the injunction; and the judgment may be revived after the five years from the death of the defendant. And this though the judgment might have been revived whilst the injunction was in force.
4. The act, Code, ch. 186, § 13, p. 710, which directs that the time for which the right to sue out execution on a judgment is suspended by the terms thereof or by legal process shall be omitted in computing the limitation, applies to judgments recovered previous to the act, which are suspended by injunction at the time when the act went into operation.
5. Upon a *scire facias* to revive a judgment which had been suspended by an injunction for forty-six years, issue was made up on the plea of payment; and upon the trial the court instructed the jury, that the pendency of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending. HELD: The instruction was proper; and it was not necessary to distinguish to the jury between the legal presumption, and the natural presumption arising from the lapse of time.

In 1804, Joseph Stover instituted an action of debt against Paulser Huber and Jacob Hutsonpiller in the County court of Greenbrier, upon a bond for one hundred and seventy-two pounds, executed in 1788. The sheriff returned the process executed on Hutsonpiller,

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and that Huber had kept him off by force of arms. Hutsonpiller appeared, and put in the plea of payment; but at the March term 1806, the plea was waived and "judgment by *non sum informatus*, for debt and costs, reserving equity."

On the same day Huber and Hutsonpiller obtained an injunction in the County court; and in January 1810, the injunction was perpetuated as to one hundred and fifty pounds. This decree was reversed upon appeal to the Chancery court at Staunton, on the ground that the cause was not ready for a hearing; and the cause was sent back to the County court of Greenbrier, where, being revived in the name of Hutsonpiller's administrator, it lingered until November 1851; when, on the motion of Joseph S. Spangler, administrator of Stover, it was ordered that unless the plaintiffs should revive the suit against him by the next term, the injunction should stand dissolved as an act of the day the order was made. And at the February term 1852 of the court, the bill was dismissed.

In March 1852, Spangler sued out a *scire facias* to revive the judgment against Hutsonpiller's administrator, in which it was described as a judgment against Huber and Hutsonpiller. In June 1852, the administrator appeared, and filed several pleas of payment by Huber and himself to Stover, and to the administrator; on which issue was joined. He also filed a plea of the statute of limitations, that the *scire facias* had not issued within five years from his qualification as administrator. To this plea the plaintiff replied the pendency of the injunction; and the defendant demurred to the replication.

When the cause came on to be heard, the County court sustained the demurrer to the replication, and dismissed the *scire facias*; but upon appeal to the Circuit court, this judgment was reversed, and the demurrer was overruled: And by consent, the cause was retained in that court for trial.

Upon the trial of the cause the plaintiff offered in evidence the original judgment, which was objected to on the ground of variance between it and the *scire facias*; but the court overruled the objection; and the defendant excepted. The variance alleged was, that the *scire facias* recited a judgment against two, when it was in fact, as defendant insisted, a judgment only against one.

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The plaintiff also offered in evidence the record of the chancery cause. And then upon his motion the court instructed the jury, "that the pendency of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending." To this instruction the defendant excepted; and there being a verdict and judgment for the plaintiff, the defendant applied to this court for a *supersedeas*, which was awarded.

William Smith and Price, for the appellant.
Reynolds and Dennis, for the appellee.

LEE, J. It is well settled that if one have judgment with a *cesset executio* for a given time, he may within a year and a day after the expiration of the agreed time, take out his execution without *scire facias*. 4 Com. Dig. 257, "Execution," I 4; *Long v. Morton*, 2 Marsh. R. 39; *Underhill Devereux*, 2 Wms. Saund. 72 c, n 4; *Hiscocks v. Kemp*, 3 Adol. & Ell. 676; *United States v. Harford*, 19 John. R. 172; *Nicholson v. Howsley*, 5 Litt. Sel. Cas. 300; *Eppes v. Randolph*, 2 Call 125, 186. So if the defendant bring error and thereby hinder the plaintiff from taking execution within the year, and the plaintiff in error be nonsuit or the judgment affirmed, the defendant in error may proceed to execution after the year without *scire facias*, because the writ of error is a *supersedeas* to the judg-

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men, and the plaintiff must acquiesce till he hears the judgment above. 3 Bac. Ab. (Wilson's ed.) "Execution," H, p. 724; 8 Ibid. "Scire facias," C, p. 601; *Winter v. Lightbound*, Strange's R. 301.

The reason assigned for this is that the *cesset executio* being with the consent and for the benefit of the defendant, and the writ of error being his own act, he should not take advantage of them, nor could he be surprised by the delay because that delay was in fact referable to himself. And this reason applies with equal force where the defendant arrests the execution of the judgment by an injunction. Hence, the same rule should apply in the latter case. It is true in some of the earlier English cases it was held that where execution was stayed for a year or more by injunction, the plaintiff could not take execution upon its dissolution, but was put to his *scire facias*. *Booth v. Booth*, 1 Salk. R. 322; *Winter v. Lightbound*, Strange's R. 301. The reason given is that the court of chancery not being a court of record, its injunction is not a matter of which the court of law will take notice. But this doctrine has long since been exploded even in England, and courts of law will take notice of injunctions and other proceedings in chancery when properly brought to their consideration. And accordingly it is now held that where execution has been stayed by injunction, the plaintiff may sue out execution within one year after it shall have been dissolved, without *scire facias*. *Michell v. Cue*, 2 Burr. R. 660; *Gibbes v. Mitchell*, 2 Bay's R. 120; *Noland v. Cromwell*, 6 Munf. 185; *United States v. Harford*, 19 John. R. 172; *Smith's adm'r v. Charlton's adm'r*, 7 Gratt. 425. Indeed the reason on which the earlier English doctrine rested never did exist in Virginia; for the courts of chancery of this state have always been courts of record, the same as the courts of law.

It is clear, therefore, that where the plaintiff is pre-

vented by injunction from proceeding to execution, he may at any time within the year after its dissolution, sue out execution without *scire facias*; and this, where the parties remain unchanged, whether the injunction have continued for more or less than ten years from the date of the judgment. A *scire facias* is no more necessary in the former case than in the latter, the reason for dispensing with it being exactly the same in both: Nor will the statute of limitations forbidding execution after the expiration of ten years from the date of the judgment apply, because notwithstanding the general terms employed, it must be understood to embrace only the cases in which the party may levy his execution if he will, and not those in which he is positively prohibited by legal process from so doing; and where the injunction continues for more than ten years, the plaintiff is equally restrained from levying his execution during the whole period as during the year after its date. But where a change of parties must be made in consequence of the death of the plaintiff or defendant, a *scire facias* for that cause is rendered necessary, and it is insisted that where the defendant is dead, the *scire facias* to revive against his personal representative must be sued out under the express terms of our statute, within five years after the qualification of such representative, notwithstanding the pendency of the injunction during the whole period. I do not think this can be correct. It is true in *Richardson's adm'r v. Prince George Justices*, and *Poindexter's adm'r v. Same*, 11 Gratt. 190, it was held that where either party to a judgment died pending an injunction, a *scire facias* might be sued out to revive the judgment without breach of the injunction. The reason is that as the plaintiff in the judgment is entitled upon the dissolution of the injunction to stand in the same situation in which he stood when it was allowed, unless he or his representative could revive

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the judgment pending the injunction, he would not be able upon its dissolution to issue his execution, but would be compelled to wait until he had sued out his *scire facias*, and prosecuted the same to judgment. And so for his benefit it was held that the plaintiff or his representative might sue forth his *scire facias* and revive the judgment without a breach of the injunction. But it was not intimated nor intended to be intimated that he was under any necessity to do so in order to preserve his right to enforce the judgment upon the dissolution of the injunction. The plaintiff whose judgment is enjoined may sue forth his execution within the year, and renew the same from time to time, so that he take care the same be not placed in the hands of the sheriff for service; but he is not bound to do so. He may in the former case defer to issue his *scire facias*, and in the latter, to issue any execution until the dissolution of the injunction, and the statute of limitations is suspended until that period. Nor can the defendant be heard to complain, because it was his own act which interposed the obstacle to the enforcement of the judgment.

That this is the correct doctrine I think very clear, independently of the provision of the Code, ch. 186, § 13, p. 710. This section, after declaring that no execution shall issue nor any *scire facias* or action be brought on a judgment after the time prescribed by the previous section, provides that in computing the time, any time during which the right to sue out execution on the judgment is suspended by the terms thereof, or by legal process, shall be omitted. Now, clearly an injunction is legal process within the meaning of this provision, and of course every case coming within its operation, the whole period during the pendency of the injunction is to be omitted in computing the time within which the *scire facias* must be issued to avoid the bar. Nor do I perceive any reason why

this section should not be held to apply to the case of a judgment recovered previously and an injunction pending at the time the Code took effect. The 19th section of chapter 149, p. 594, provides, in regard to actions, suits, &c. pending the day before the commencement of the Code, that they should be subject to the same limitation as if that Code had not been enacted; and where not so pending, if the right to prosecute the same should exist on that day for a certain number of years prescribed by any statute, the same should be prosecuted within the same time as the same might have been if that chapter had not been enacted. The 13th section of chapter 186, p. 710, provides that the above named 19th section (with others) shall apply to the right to bring such action or *scire facias* (as therein mentioned) in like manner as to any right, action or *scire facias* mentioned in said 19th section. The effect of the whole taken together would seem to be to preserve as to all actions and right to action existing when the Code took effect, the pre-existing periods of limitation, but prescribing as to all as well those just mentioned as those thereafter accruing, a mode by which in certain cases the time of limitation is to be computed, and which excludes from such computation the time during which (in the case of a judgment) the right to sue out execution should be suspended by the terms thereof or by legal process, thus giving to the rule deducible from the cases the sanction of statutory enactment.

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In this case the judgment was rendered on the 26th of March 1806, and the injunction was obtained on the same day; and the cause appears to have remained pending in the County court, and afterwards in the District court of chancery at Staunton, and again in the County court, to which it had been remanded, until the November term 1851, when an order was made declaring the injunction to stand dissolved unless

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revived by the next December court; and not having been so revived, at the February term 1852, the bill was dismissed. The death of the parties occurred pending the injunction, but the *scire facias* was sued out in March 1852. I think, therefore, the statute of limitations was no bar, and that the demurrer to the replication was properly overruled.

It is objected, however, that when this demurrer was overruled, an issue should have been made up upon the replication before the trial of the issues on the pleas of payment. But it was the fault of the plaintiff in error himself that it was not done. He neither offered to withdraw his demurrer nor tendered any rejoinder to the replication, and the court could only pass on to the trial of the issues which he chose to make.

Another objection is, that the Circuit court improperly permitted the judgment to go in evidence to the jury, it appearing that it was a judgment against Hutsonpiller alone, whilst the *scire facias* set out a judgment against him and one Patser Huber jointly. From the record sent up to this court it would appear that the judgment was against Hutsonpiller alone; but a doubt being suggested as to its correctness, the original record has been brought before us for examination, by consent of parties. From this it appears that the *capias* was returned "executed" as to Hutsonpiller, and "kept off by force of arms" as to Huber. At the next rules, a common order was entered, which was subsequently confirmed. At the March court following, Hutsonpiller appeared and pleaded payment, and at the March term 1806, this plea was waived and judgment by *non som informatus*. By the law as it stood at that day (act of 28th January 1800) a party might proceed on the return "kept off by force of arms" as if the process were executed; hence the common order and its confirmation may well be held

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to apply to both defendants. But the record being merely brief minutes of the clerk, it is difficult to determine whether the office judgment was set aside as to both defendants or Hutsonpiller only; and if the latter, then the judgment against Huber must have been at March court 1805 instead of 1806. But the question of variance does not in fact arise in the case. To raise it, the party should have pleaded *nul tiel record*, which would have put the plaintiff in the *scire facias* to the production of a record such as was alleged; or he should have craved oyer of the record, and demurred. *Wood v. The Commonwealth*, 4 Rand. 329. In this case he did neither, but pleaded payment, which was a confession of the record, and an avoidance by new matter. The plaintiff was not therefore called on to produce the record; and any variance between the *scire facias* and that which he did produce was immaterial. It is not like an action of debt upon a bond, in which upon the plea of payment the plaintiff is required to produce the bond. *Moore v. Fenwick*, Gilm, 214. The reason is that inspection of the bond is necessary to ascertain the dates and amounts of any credits that may be endorsed, with a view to the calculation of the amount for which, under our statute, judgment is to be given. This reason has no application to the case of a record.

The remaining grounds of error assigned founded upon the instruction given to the jury, may be considered together.

The parties stood upon issues of payment in a court of law, and such a court possesses no discretionary power to refuse its aid to enforce a claim out of deference to any supposed public policy forbidding the assertion of stale demands. All that it could do was to instruct the jury as to the rules of law and evidence by which it was to be governed in considering the case. The court must of course in every case take

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care not to encroach upon the functions of the jury by withdrawing from it any question of fact proper for its determination: and if the instruction given in this case admitted of the construction which has been placed upon it, it might be obnoxious to the charge of improperly trenching upon the province of the jury. Such I think, however, is not its fair construction. Presumptions are said by a learned writer to be of two kinds, *legal and artificial*, and *natural*. The former derive from the law a technical or artificial operation and effect beyond their mere natural tendency to produce belief. The latter act merely by virtue of their own natural efficacy. 3 Stark. Ev. 1235. The writer then illustrates by the case of a bond which has been suffered to stand for twenty years or upwards without payment of interest or other acknowledgment of its existence. In such a case, satisfaction of the bond is a legal presumption. But if a shorter period, even a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time does not arise, though in the latter case it may be inferred, where other circumstances render it probable; but in this case the mere lapse of time possesses no artificial or arbitrary operation, but is left to its mere natural tendency to convince the minds of the jury that the debt has been paid. This distinction is recognized by other writers. 2 Greenl. Ev. § 528; Best on Presumptions, § 16, p. 18, § 137, p. 187, § 38, p. 45. See also *Eldridge v. Knott*, Cowp. R. 214; *Hillary v. Waller*, 12 Ves. R. 239, 266.

Now, in the case of a judgment upon which no proceedings have been had for twenty years or upwards, the legal presumption could only arise where the party was at liberty to enforce it if he would. Where, however, his hands are tied and he is expressly prohibited to take any measures for that purpose by an injunction obtained by the defendants themselves, and the ob-

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stacle thus interposed continues during the whole period, this arbitrary and artificial presumption would not arise from the mere lapse of time, however much that might weigh with the jury by its natural tendency, in connection with the other circumstances, to convince their minds that the debt had been satisfied. And it is to this distinction that the judge should be understood as alluding when he speaks of the effect of the pendency of the injunction upon the "legal presumption of payment," which would otherwise have arisen from the lapse of time. Thus construed, I do not perceive that the instruction is obnoxious to any well-founded objection, whether in any given case this legal, artificial presumption arises, is, I presume, matter of law on which the court may pass, and in a case in which the delay to proceed has grown out of the act of the defendants themselves, no such legal presumption can be raised in their favor. The effect of the injunction is, as we have seen, to take the case out of the operation of the express statutes of limitation; and it cannot be less potent to withdraw it from the operation of the artificial or legal presumption of payment during the same period.

But whilst the court thus instructed the jury that this legal presumption would not arise, it said nothing from which they should have inferred that they were not at liberty to look into the whole circumstances of the case in connection with the length of time which had been suffered to elapse, and from them to infer and find the fact of payment. It left the time elapsed to have its proper and natural tendency to lead them, in connection with the death of the parties, the failure to take measures sooner to have the injunction dissolved, the ability of the parties to pay, and all the other circumstances of the case, to that conclusion. It placed the case during the pendency of the injunction on the same footing as if there had been no injunction, but

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no error. If the party apprehended that the jury
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adm'r passing on the question of payment upon a review of
the whole circumstances of the case, it was his duty to
apply to the court for a proper supplemental instruction,
which would have guarded against any such mis-
apprehension, and which we cannot suppose would
have been refused.

I am of opinion to affirm the judgment.

MONCURE, J. I am of opinion that the Circuit court erred in instructing the jury "that the pendency of the injunction cause repelled the legal presumption of payment which would have arisen from lapse of time, if said injunction had not been pending." Under all the circumstances of the case, I think the jury ought to have presumed that the debt had been paid, and ought to have found a verdict for the defendant. Forty-six years elapsed between the date of the judgment and the *scire facias*; during which period both parties to the judgment died. For thirty-eight years the injunction case was on the sleeping docket of the County court, and not an order was taken in it; not even an order of continuance. Thirty-one years elapsed after the obligee's administrator qualified, and before he made a motion in the case. There was nothing to repel the presumption of satisfaction arising from this long lapse of time and this gross laches of the obligee and his representative but the bare pendency of the injunction case, if pendency it can be called. If that fact be sufficient to repel the presumption in this case, it would be so in any case; and no lapse of time, however long, no laches, however gross, would be a sufficient foundation for the

presumption of satisfaction of a judgment during the pendency of an injunction thereto. The pendency of the injunction in this case, so far from weakening, seems to me to strengthen the presumption of satisfaction of the judgment. If there had been no injunction, the law would have presumed such satisfaction from the mere lapse of time. Here the presumption seems to be strengthened by the additional facts that equity was expressly reserved on the face of the judgment; that on the very day on which it was rendered it was enjoined on the ground that it had been satisfied, and that no step was taken to have the injunction dissolved for so long a period after the cause was set for hearing. What other inference can be drawn from these facts than that the obligee and his representative did not move sooner in the matter because they believed that the injunction was well founded; or because the balance of the debt had been paid by the collection of the balance of the order mentioned in the bill of injunction, or otherwise? How unjust and contrary to public policy it would be, after so great laches on the part of the obligee and his representative, to require the representative of the obligor to prove actual payment of a debt of which he had probably no personal knowledge, and when the means of doing so had either ceased to exist or been greatly diminished by lapse of time.

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But it is said that the court only instructed the jury that the legal presumption of payment arising from lapse of time was repelled by the pendency of the injunction; and that the jury were still at liberty to make an actual presumption of payment, from all the circumstances of the case, including lapse of time as one of them.

There can be no doubt, I think, but that the instruction of the court produced the verdict of the jury for the plaintiff. I think the instruction was wrong in

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itself; and even if right in itself, or in the abstract, it misled, and was calculated to mislead, the jury. I think it was wrong in itself. The pendency of the injunction for more than thirty-eight years, without any step being taken in the case, did not repel but rather strengthened the legal presumption of payment arising from lapse of time. At most, it could only have tended to repel the presumption, and should have been left to the jury as evidence to be weighed by them. And the court invaded their province in telling them that it repelled the presumption.

But at all events, it misled the jury, and was calculated to have that effect. They could not be expected to know the difference between legal presumptions and actual presumptions; and when told that the legal presumption of payment arising from lapse of time was repelled by the pendency of the injunction, they naturally inferred that unless there was some other evidence of payment, they must find a verdict for the plaintiff. If the court had been of opinion that while the legal presumption was repelled by the pendency of the injunction the jury might still presume payment from the mere lapse of time, notwithstanding the pendency of the injunction, it should so have told the jury; and would, I think, so have told them. It is obvious that the court was not of that opinion.

I incline also to think that the Circuit court erred in reversing the judgment of the County court, and that the act of limitations was a bar to the *scire facias*. At least forty years elapsed between the death of the defendant in the judgment and the date of the *scire facias* to revive it against his administrator, who qualified soon after his death. There was nothing to prevent the suing out of the *scire facias* before. The pendency of the injunction did not prevent it, as has been decided by this court. *Richardson v. Prince George Justices*, 11 Gratt. 190. It seems to follow as a

consequence, that the right to sue out the *scire facias* having accrued at the qualification of the administrator, and not having been suspended by the pendency of the injunction, is barred by the act of limitations. In *Barker v. Millard*, 18 Wend. R. 572, it was held that an injunction would not suspend the running of the statute, and that the proper course in such case is for the court of chancery to restrain the defendant from setting up the statute in an action at law. The case is now provided for by law in New York; but *Barker v. Millard* arose before that law took effect. So here the case is provided for by the Code, p. 710, § 13; but this case arose before the Code took effect, and seems to be governed by the same principle which governed *Barker v. Millard*. There might be some reason in holding that an injunction would suspend the running of the statute to a *scire facias* to revive a judgment after a year and a day by or against the same parties, but not to a *scire facias* to revive a judgment when there is a new party to the suit. In the former case, the only object of the *scire facias* is to have execution; which cannot be issued in consequence of the injunction. In the latter, the object is to revive the judgment in the name of a person who was not a party to it. As this must be done, when necessary, before an execution can be issued upon the judgment, there can be no impropriety in doing it pending an injunction, so that when it is dissolved, the plaintiff may be in a situation to sue out execution. A judgment against a decedent, which is enjoined, especially where nothing is done in the injunction suit during the period of limitation, seems to be both within the letter and spirit of the statute, 1 Rev. Code, p. 492, § 17, which declared that no action of debt shall be brought against an executor or administrator, &c. upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against

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qualification of his executor or administrator, &c.; and
all such judgments, after the expiration of five years,
upon which no proceedings shall have been had, shall
be deemed to have been paid and discharged; saving,
&c. But while this is the strong inclination of my
mind, I do not mean to express a decided opinion upon
the question.

In regard to the other questions arising in the cause,
I concur in the opinion of Judge LEE.

ALLEN, P. and DANIEL and SAMUELS, Js. concurred
in the opinion of LEE, J.

JUDGMENT AFFIRMED.

Lewisburg.**BALTIMORE & OHIO R. R. Co. v. McCULLOUGH & Co.**

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1. The contract between a railroad company and one of the contractors on its line of improvement provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. The contractor cannot recover the amount of the final estimate until he has executed the release: And his attaching creditor at law has no greater rights against the company in respect to this final estimate than he has; and therefore cannot recover the amount unless the contractor has executed the release.
2. In such case, the common law court has no authority to make its judgment against the company operate as a release under seal by the contractor.

Patrick McCullough & Co. instituted an action of debt in the County court of Marion against Patrick McDonough, William McDonough and B. McDonough, for the sum of five hundred and twenty-five dollars and twelve cents. On the same day on which the process was issued, an attachment was sued out by the plaintiffs to attach the effects of the defendants to satisfy the debt for which the action was brought. This attachment was served on the Baltimore and Ohio Railroad Company. There was a judgment for the plaintiffs against the defendants in the action.

The Baltimore and Ohio Railroad Company appeared in obedience to the attachment, and answered, that there was a contract between them and William McDonough for the graduation and masonry of a certain section of its road in Marion county; and that said graduation and masonry were completed and accepted before the service of the attachment. That on the final estimate of this work, by the chief engineer of the company, there was due to the said

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McDonough six hundred and ninety dollars; that this work was done under a written contract, whereby it was among other things stipulated between the company and said McDonough, that during the progress of the work there should be monthly estimates, by the engineer, of the work done, four-fifths of the value of which should be paid by the company; and when the work was completed and accepted by the chief engineer, there should be a final estimate of the quantity, value and character of the work, by the said engineer; when the balance appearing to be due to the said McDonough should be paid to him upon his giving a release under seal to said company, from all claims or demands whatsoever growing in any manner out of said agreement. That the said six hundred and ninety dollars was money found to be due to said McDonough on the final estimate made by the said chief engineer, upon the work done by the said McDonough, under the contract aforesaid; that the said McDonough had never signed the release aforesaid; and that he had left the commonwealth and gone to parts unknown; that the company had always been ready to pay the money upon the execution of the release; but that they were not liable to pay the same until the said release was executed by the said McDonough.

The County court gave the plaintiffs a judgment against the Baltimore and Ohio Railroad Company for the amount of their debt with interest, that being less than the amount due from the company to McDonough. And it was further ordered and adjudged by the court, that their judgment should operate and be of the same force and effect as if the said McDonough had signed a release in accordance with the contract made with the said company. From this judgment the company obtained a *supersedeas* from the Circuit court of Marion county, where it was affirmed. And the

company then applied to this court for a *supersedeas*, which was allowed.

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Andrew Hunter, for the appellant.

A. F. Haymond, for the appellees.

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LEE, J. Stipulations in a covenant or other contract are to be regarded as dependent or independent, according to the intention and meaning of the parties, and the good sense of the case. *Hotham v. East India Company*, 1 T. R. 638; *Porter v. Shepperd*, 6 T. R. 665; *Campbell v. Jones*, 6 T. R. 570; *Morton v. Lamb*, 7 T. R. 125. And where an act is to be done by one party by way of condition precedent to his right to claim performance on the part of the other, he cannot claim such performance without averring the doing of such act or his readiness and offer to do it. *Thorpe v. Thorpe, Lord Raym.* 662; *Collins v. Gibbs*, 2 Burr. R. 899; *Brockenbrough v. Ward's adm'r*, 4 Rand. 352. So where the reciprocal acts are concurrent, and to be done at the same time, neither party can maintain an action against the other without averring performance of his own part of the agreement, or that which is equivalent. *Glazebrook v. Woodrow*, 8 T. R. 366; *Morton v. Lamb*, 7 T. R. 125; *Heard v. Wadham*, 1 East's R. 619; *Robertson v. Robertson*, 3 Rand. 68; 1 Saund. 320 d; *Roach v. Dickinsons*, 9 Gratt. 154.

In this case it is plain the provisions in the agreement for the execution of the release, and the payment of the amount found due on the final estimate, must be regarded as mutual and dependent. This was only to be paid upon McDonough's executing a release under seal of all claims and demands whatever against the company in any manner growing out of the agreement. McDonough can maintain no action for the recovery of the amount of this final estimate without averring that he had executed and delivered or tendered

1855. the required release. The stipulation for the release is
July perfectly distinct and intelligible, and must have been
Term. regarded by the parties as material. In effect, they

Baltimore made it part of the consideration for the payment of the
and Ohio final estimate. The company insisted on the right to
R. R. Co. retain this until all litigation about previous estimates,
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lough & Co. ments, &c. had ceased, or until the contractor should
release all supposed causes of action that might arise
out of the contract. It was deemed important thus
to provide a means to compel the contractor to assert
any claim he might think he had against the company
in due time before by the covering up of the work or
other causes it might be impossible to ascertain its
proper class, amount and value, or to release such sup-
posed claims if he would demand payment of the final
estimate; and the contractor submits to such a provi-
sion. If parties will deliberately enter into such a
stipulation, no reason is perceived why full effect must
not be given to it in a court of law. However strin-
gent it may be, it is neither immoral nor illegal nor
tainted with any other vice which should forbid the
aid of that court to its enforcement.

And as the contractor could not thus compel pay-
ment of this final estimate without averring the deli-
very or tender of the required release, neither can the
attaching creditor, without showing the same or its
equivalent. The latter comes in under the former;
can claim only as he can claim; and must recover on
the same terms. There is nothing in the attachment
law which amplifies or extends the rights of a creditor
seeking its aid in the subject attached beyond those of
his debtor. To recover at law on his attachment he
must do or have done what his debtor would be re-
quired to do to entitle him to recover. The attach-
ment law remits no preliminary duty required of the
debtor to perfect his demand, in favor of the attaching

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creditor. To do so would be not to enforce but to change the contracts of parties without their consent or default; and this it was neither the province nor the design of the act to do. The 12th section, which creates the lien, was intended to give to the attaching creditor a preference over all others acquiring rights to the subject after the levy of his attachment by transfer or otherwise from the party or by legal process. It was not designed to take from the garnishee any previous right which he had, nor to subject him to any recovery under the attachment from which by the terms of his contract he was exempt until performance by the other party of his part of the agreement. The case of *Doe ex dem. Mitchinson v. Carter*, 8 T. R. 57, and *Ibid.* 300, cited by the counsel, seems to have been decided purely on the question of the meaning of the covenant and the intention of the parties. It was there held that the levy of an execution upon a lease containing a covenant against letting, selling, assigning, &c. with a clause of re-entry in case of breach, created no forfeiture because not so intended; all the terms of the lease pointing to some act to be done by the tenant himself. It was not upon the notion that the rights of the creditor were in any wise amplified or enlarged. And all the judges were agreed that a covenant might be inserted in a lease which would prevent the term from passing under a commission of bankruptcy, or being levied on under an execution against the tenant. As said by Lord Kenyon, "a grant of an estate *prima facie* carries with it all legal incidents; but *modus et conventio vincunt legem*, and parties to a contract may model it in what manner they please." *Ibid.* 61. This latter remark applies with full force to the present case.

A judgment for the whole amount of the final estimate, even if fully paid, would not amount to such a release as would fill the terms of that required by the contract. It could serve as a bar *pro tanto* only: it

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would be no bar to an action for other alleged breaches of the contract. This would be true if the action were at the suit of the party himself; *a fortiori* the judgment on the attachment could only bar for so much. Beyond this the debtor in the attachment suit would clearly not be bound. It would be unjust he should be. The attaching creditor has no interest in the subject beyond his demand. If the garnishee admits funds to that amount or the jury finds them, he looks no further but takes his judgment accordingly. He is not concerned to contest whether his debtor have not further demands against the garnishee; and the judgment against the latter ascertains that there is so much at least in his hands, but not (as against the debtor) that there may not be more. But the party was entitled to release not only for the final estimate, but for all other causes of action whatever arising out of the contract: and this certainly he would not gain by a judgment for a part of the final estimate only, as this judgment in fact is. And the release was to be under the seal of the party: *ita scripta est*, and although if a contract be by parol, it may before breach be waived by parol, yet after breach, a release to operate as such in a court of law must be by instrument under seal. Bul. N. P. 152; Chit. Cont. 778; *Bender v. Sampson*, 12 Mass. R. 44; *Crawford v. Millspaugh*, 13 John. R. 87.

Nor does the declaration appended to the judgment, that it is to have the force and effect of a release executed in accordance with the contract, give to it any different character or operation. The court had no power in this summary mode, to terminate and cancel the contract as to either of the parties. Whether the debtor had or had not other and further demands against the garnishee beyond the amount sequestered, was not in issue in the proceeding, and without ascertaining that he had not, no court could undertake to absolve the company from its entire liability. But a

court of law possesses no such power to enlarge and extend the operation of its judgment, and of its own motion to assign to it a specific character and effect. Its judgment still has its regular and legal operation only, which is to bar the debtor of his action against the garnishee to the extent of the amount thereby recovered. Beyond this he is in no manner bound; and the attempt to make the judgment operate as a full release of all causes of action against the garnishee under the contract, to overcome the objection of the want of the release stipulated for in the contract, was a mere nullity.

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That the lien of the attachment cannot be enforced without rendering a judgment against the garnishee, can be no reason why his legal rights should be invaded; nor can it give the court power to render a judgment against him, when according to the terms of his contract he was not liable to such judgment. That the debtor might improperly withhold the release for the purpose of baffling his creditors, or that he and the garnishee might collude to prevent them from reaching the effects in the hands of the latter, cannot authorize a court of law either to disregard the terms of the contract between the garnishee and the debtor, or to substitute a discharge by its judgment for the release under seal required as the condition of the payment of what may be due. From whatever motive the release be withheld, the remedy of the creditor must be sought in another forum.

I am of opinion to reverse the judgment and discharge the attachment.

The other judges concurred in the opinion of
LEE, J.

JUDGMENT REVERSED.

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McGINNIS v. THE WASHINGTON HALL ASSOCIATION.

September 8.

A notice, given at 8 P. M. to take a deposition between 8 and 9 A. M. of the next day, in the city where both parties and their counsel reside, would generally be reasonable notice. And such notice given directly the plaintiff learned the witness would leave for a distant state on the next evening by 3 o'clock, and would not return again, is sufficient, though a court was in session in the city at the time, and though the defendant, who is an attorney, and his counsel, had been occupied as counsel in a cause on the day of the notice, and were to be and were so occupied on the next day, so that they could not attend to the taking of the deposition.

This was an action on the case in the Circuit court of Ohio county, brought by Dorrance McGinnis against the Washington Hall Association, for injury done to the wall of plaintiff's house, by digging on the adjoining lot. On the trial the plaintiff offered to introduce in evidence the deposition of Michael Keafe, which had been taken *de bene esse*, which was objected to by the defendant on the ground of the insufficiency of the notice. The court sustained the objection, and excluded the deposition; and the plaintiff excepted. The notice was given to M. Nelson, the president of the Washington Hall Association, at 8 o'clock P. M. on the 18th of November 1852, that on the next day between the hours of 8 and 9 o'clock A. M. the deposition would be taken at the office of Sherrard Clemens in the city of Wheeling. At the hour of 8 o'clock A. M. the deposition was commenced, when Fitzhugh, one of the counsel for the defendants, who was then present, objected to it, on account of the insufficiency of the notice, and the inability of the defendant and defendant's counsel to attend; but the deposition was taken.

It appeared on the hearing of the objection, that M. Nelson was a practicing lawyer in the courts of Ohio county, and was, on the morning of the 19th of November 1852, required to be in court to attend to the business of his clients; but that the court did not meet until 9 o'clock A. M. And that Fitzhugh, who appeared for the defendant at the time and place of taking the deposition, informed the notary who took it, that the defendant's counsel were unable to attend to the taking at the time and place, on behalf of the defendant: And it was proved that the said counsel, including said M. Nelson, were on that day engaged in court in the trial of a case, and had been so engaged on the day previous.

On the other hand, it appeared that the witness Keafe was about to go to the state of Louisiana, and so informed the plaintiff's counsel; and that as soon as the counsel was informed of his intended removal, the notice was given. That he was absent at the time of the trial, and had been absent since the taking of the deposition; he having left Wheeling about 3 or 4 o'clock of the afternoon of the day it was taken, and having informed plaintiff's counsel that he had taken his passage on a boat, and would remain no longer.

There was a verdict and judgment for the defendant: whereupon McGinnis applied to this court for a *super-sedeas*, which was awarded.

Jacob, for the appellant.

Russell, for the appellee.

MONCURE, J. The only question in this case is, whether the Circuit court erred in excluding the deposition of Michael Keafe, on the ground of insufficiency of the notice under which it was taken?

The law requires that "reasonable notice shall be given to the adverse party of the time and place of

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taking every deposition." Code, ch. 176, § 30, p. 666. What is reasonable notice, is no where defined in the law, and cannot well be defined, but must depend on the circumstances of each case.

A notice served at 8 o'clock P. M. of the taking of a deposition, between the hours of 8 o'clock and 9 o'clock A. M. of the succeeding day, at a certain place in the same city in which both the parties and their counsel resided, (as in this case,) would ordinarily be sufficient.

But the deposition in this case was taken during a term of one of the courts of Ohio county, whose session was in the city of Wheeling. And Mr. Nelson, president of the Washington hall association, on whom the notice was served, and who is a practicing attorney in the said courts, and was one of the counsel of the association in this case, and Mr. Fitzhugh, another of said counsel, were engaged in court on the day on which the deposition was taken, and had been so engaged on the previous day, in the trial of causes; though the court did not meet before 9 o'clock A. M. And the said Fitzhugh attended at the commencement of the taking of the deposition, which was at 8 o'clock A. M. and objected to the reading of it, "on account of the insufficiency of the notice, and the inability of the defendant and defendant's counsel to attend at the taking thereof." Under these circumstances, if there had been no other materially affecting the case, it would have been proper to have postponed the taking of the deposition to a more convenient period.

But there were other most material circumstances. The witness was about to remove to a far distant state, had taken his passage on a boat, and would remain no longer; left the city about 3 or 4 o'clock P. M. of the day on which his deposition was taken. As soon as the plaintiff's counsel was informed by the witness of his intended removal, the notice was given. And

about 8 o'clock A. M. of the next day, the plaintiff again notified the president of the association that he was about to take, and would take the deposition.

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The plaintiff, upon being informed that the witness was about to remove from the state, had a right to take his deposition before his removal. Otherwise, he might have lost the benefit of the evidence altogether, by the death of the witness or his removal to parts unknown; or at least, might have been subjected to much trouble and expense in ascertaining the place of his future residence, and taking his deposition there. It was obviously for the benefit of both parties to take the deposition in the city in which they and their counsel all lived. The plaintiff gave the notice as soon as he was informed of the necessity of taking the deposition, and gave the longest notice which it was then in his power to give. He fixed upon a time and place for taking it, as convenient as possible to the defendant, and did everything in his power to enable the defendant's counsel to attend. If they could not attend, the defendant ought to have employed other counsel for that purpose, rather than the plaintiff should be subjected to the risk of losing his evidence, or at least to the trouble and expense of taking the deposition in a distant state. Other counsel could no doubt have been readily retained in the city of Wheeling; and the defendant had ample time for that purpose after the notice was served.

But it was argued by the defendant's counsel in this court, that the notice was not reasonable, if the defendant did not know that the witness was about to remove from the state; that it does not appear that the defendant had such knowledge; and that it devolved on the plaintiff to have given the information.

It does not appear that the defendant or its officers or counsel had not this information; and the fair presumption, I think, is, that they had. It does not ap-

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pear that the fact was concealed, or that there was any conceivable motive for concealing it. It might have been reasonably inferred from the facts that the witness was probably neither aged nor infirm, that the trial was not to take place for some time, and that there was no other apparent or plausible motive for taking the deposition. Can it be believed that Mr. Nelson did not enquire, when the notice was served on him, or when he was again notified the next day of the taking of the deposition, why it was taken at that time, or whether it could not be postponed? Can it be believed that Mr. Fitzhugh did not make such enquiries when he attended at the commencement of the deposition? Can it be believed that, if made, they were not truly answered by the plaintiff, or his counsel, or the notary? Or if not truly answered, that the fact would not have been stated in the exception taken at the time, or in the bill of exceptions taken on the trial? Mr. F. did not ask for a postponement of the time for taking the deposition, as he would undoubtedly have done if he had not known that the witness was about to leave the state, and that such postponement was therefore impossible. He placed his objection on the broad ground that the notice was insufficient, notwithstanding the circumstances under which the deposition was taken: And on that ground only the objection was taken at the trial. The purport of the objection was, that under no circumstances could the deposition be taken upon so short a notice, and during the term of a court in which the defendant's counsel were professionally engaged. The plaintiff had a right so to regard the objection, and was not called upon to show that the defendant had knowledge of the intended removal of the witness. The defendant certainly knew at the time of the trial that the deposition had been taken on account of the intended removal of the witness; and if it was intended

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to object to the sufficiency of the notice upon the ground that the plaintiff did not inform the defendant of that fact, the ground should have been stated specifically in the bill of exceptions. And then he might have removed it by proof, whereas he would be taken by surprise if the ground could be taken for the first time in this court.

But the plaintiff was under no obligation to give such information, provided he was guilty of no fraudulent concealment, which is not pretended. He was bound only to give reasonable notice of the time and place of taking the deposition; which, under all the circumstances, I think he did. If it can be necessary to cite authorities in support of the views I have expressed, I think the cases in *Vinal v. Burrill*, 16 Pick. 401, and *Allen v. Perkins*, 17 Id. 369, referred to by the counsel of the plaintiff, are sufficient for the purpose.

I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial.

The other judges concurred in the opinion of Moncure, J.

JUDGMENT REVERSED.

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ARMSTRONG'S heirs v. WALKUP & als.

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1. Upon the coming of age or marriage of a ward, or the death of the guardian, the guardianship terminates; and from that time only simple interest is to be charged on any balance then in his hands, or which he afterwards received.
2. The estate of the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian. But from the termination of the guardianship, the same to be accounted for on the ordinary principles governing accounts between debtor and creditor.
3. A guardian is not to be charged interest upon the moneys received by him from the day it is received; but he is to be allowed six months in which to invest it.
4. A guardian retains his female wards in his family, and treats them as his children, but they are required to work as children might be; though the condition of his family did not require their services. The guardian is to be allowed a reasonable compensation for their board and clothing; and he is not to be charged for their services.

This is the sequel of the case of *Armstrong's heirs v. Walkup & others*, 9 Gratt. 372. When the cause went back to the Circuit court, that court made an order directing a commissioner to state and report an account between the parties in accordance with the decree of the Court of appeals.

The commissioner stated the accounts of the three wards separately. He allowed the guardian sixty dollars a year for the maintenance of each of them, but charged him for their labor after they were twelve years old, at seventeen dollars and fifty cents a year. The guardian's accounts are brought down to November 26th, 1846, the death of the guardian, and simple interest upon the amount then due is charged. These

statements are made upon the evidence in the record when the case was before this court. According to this statement of the accounts, there was due to Sarah Jane Elliott, on the 26th of November 1846, nine hundred dollars and thirty-six cents, with interest from that date. There was due at the same date to Ann Eliza, the wife of the plaintiff Walkup, eight hundred and seventy-two dollars and twenty-two cents; and he being charged with the sum of one thousand two hundred and seventy-nine dollars and nine cents, paid to him by the administrators of Armstrong on the 9th of October, 1847, the amount due this ward was then extinguished, and there remained a balance of three hundred and thirty-five dollars and twenty cents, to be applied as a credit upon the amount due Elizabeth M. Elliott, of whom Walkup had qualified as guardian, leaving the amount due to her at this last date, of five hundred and fifty-nine dollars and two cents.

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After the cause went back, both the plaintiffs and the defendants took testimony in relation to the services rendered by the wards in their guardian's family. It was proved that the guardian and his wife were industrious people, and allowed no idlers about them; and that the girls worked in the family. Several witnesses estimated their services at a dollar a week, or fully equal to the expense of their maintenance after they were twelve years old. But it was also proved that Armstrong's white family, besides his wards, consisted only of himself and wife; and that he had a negro woman with three or four children, some of them females about the age of the wards, and able to work; and that the wards were treated with kindness and affection by Armstrong and his wife; indeed as if they had been their own children.

Upon this new evidence, the plaintiffs insisted that the commissioner should make a statement of the ac-

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counts, disallowing any compensation for the maintenance of the wards beyond their own services. This statement was made; and according to it, there was due to Sarah Jane Elliott, on the 26th of May, 1847, one thousand five hundred and sixty-three dollars and forty-six cents, with interest thereon from that date. There was due at the same date to Ann Eliza, the wife of the plaintiff Walkup, one thousand three hundred and ninety dollars and thirty-one cents, leaving still due to her, after crediting the sum of one thousand two hundred and seventy-nine dollars and nine cents, the sum of one hundred and eleven dollars and twenty-two cents, with interest from that date; and there was due at the same date to Elizabeth M. Elliott, one thousand two hundred and forty four dollars and twenty-eight cents, with like interest.

The commissioner also stated an account of the administration upon Armstrong's estate, in which he charged the administrators with the amount of two bonds which had been executed to Armstrong in his lifetime by William and Elijah May, for the purchase money of land; and which the administrators stated the obligors had refused to pay, because there was a controversy as to the title to the land; and he disallowed a credit for the amount of a bond which they had paid in 1851. The amount reported in the hands of the administrators on the 16th of October 1854, was one thousand one hundred and ninety dollars and forty-one cents of principal, and four hundred and forty-seven dollars and twenty-six cents of interest.

The plaintiffs excepted to the report of the commissioner, because commissions were allowed to the guardian; and to the first statement, because no allowance was made for the services rendered by the wards.

The heirs of Armstrong excepted to the second statement of the commissioner: 1st. Because it was

not authorized by the decree of the Court of appeals. 2d. Because only fifty dollars a year was allowed for the support of the wards until they were twelve years old. And 3d. Because no allowance was made for their maintenance after the age of twelve.

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The administrators excepted: 1st. Because they were not allowed a credit for the amount of the bond paid off by them in 1851. 2d. Because they were charged with the two bonds of the Mays.

The cause came on to be heard in October 1854, when the court overruled the exceptions of the defendants, and the first exception of the plaintiff; and sustaining the second exception of the plaintiff, adopted the second statement of the commissioner, and decreed in favor of the plaintiffs for the sums found due to them respectively by that statement. And unless the same should be paid within thirty days from the date of the decree, the sheriff of the county was appointed a commissioner to sell upon the terms stated in the decree, so much of the land of Armstrong in the bill and proceedings mentioned, as should be sufficient to pay off the debts, interest and costs decreed to the plaintiffs. And the exceptions taken by the administrators were overruled; the court being of opinion that the questions raised by these exceptions were concluded by the decree of the Court of appeals. From this decree the heirs of Armstrong applied to this court for an appeal, which was allowed.

Smith and McPherson, for the appellants.

Price, for the appellees.

SAMUELS, J. delivered the opinion of the court:

The court is of opinion, that the decree of this court, rendered in this cause when formerly here upon appeal, did not preclude the administrators of John

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Armstrong deceased from showing that a portion of the assets with which they were charged had become unavailable without default of the administrators, and therefore not proper credits for the estate; nor from showing any proper debits to the estate for money paid in discharge of debts due from their intestate, which had been omitted from the account, without default in the administrators; and that the Circuit court erred in holding the said administrators concluded by the decree of this court from asking relief against the errors alleged to exist in these particulars.

The court is further of opinion, that upon the arrival at full age or marriage of the wards respectively, or upon the death of John Armstrong, his authority as guardian ceased; and that from the termination of the guardianship, the account between the several wards and John Armstrong in his lifetime, or his estate after his death, should be taken, charging simple interest on any balance then in hand and on money thereafter received, on the ordinary principles governing accounts between debtor and creditor, as contradistinguished from the principles governing accounts between guardian and ward, during the guardianship.

The court is further of opinion, that as the money of the ward derived from the estate of their mother, their slaves and land, came to the hands of John Armstrong as guardian, his bond of office bound him in his lifetime, and his estate after his death, for the interest, hires and rents respectively received by him, whether received before or after the expiration of his authority as guardian. So much thereof as was received whilst his office continued, to be accounted for as guardian up to the time he ceased to be guardian; and thereafter the balance then in hand, and any interest, hires or rents thereafter received, to be

accounted for on the ordinary principles governing accounts between debtor and creditor.

The court is further of opinion, that the estate of John Armstrong should not be charged with interest on the several sums of money received as principal, interest, hires or rents from the day of the receipt thereof, but should be allowed six months in which to make investments.

The court is further of opinion, that the credit allowed to Armstrong's estate for the board and clothing of his several wards, is reasonable, and was properly allowed; and further, that no charge should be allowed to the several wards for services rendered to their guardian whilst living in his family; that the condition of the guardian's family did not require the services of these hired girls in its domestic affairs, so that those services were of but little value to him. The guardian being charged by law with the custody of the persons of his wards, they, being females, were properly retained by him in his own family, and should not have been hired or bound apprentices to strangers, unless necessity had required it. The labor performed by the wards had the effect of instructing them in arts and skill which will be useful to them through life; they should not be permitted to allege that the guardian, under the circumstances, should have hired them out, or bound them apprentices, and not having done so, be charged for services rendered. A due regard for the proper custody of their persons should not be overlooked for any pecuniary consideration whatever, much less for any value attached to their services.

Thus the court is of opinion that the decree of the Circuit court is erroneous. It is therefore adjudged, ordered and decreed, that the same be reversed and annulled, and that the appellees do pay to the appellants their costs in this court expended; and that

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1855. the cause be remanded, with directions to have the
July accounts reformed upon the principles of this decree,
Term. upon the materials now in the record, and upon such
further proof only as may be taken to show at what
periods Armstrong's wards severally ceased to be under
his control as guardian, by their arrival at full age
or marriage, or by the death of Armstrong. Which
is ordered to be certified, &c.

DECREE REVERSED.

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In an action at law, the parties waive a trial by jury, and submit the whole matter of law and fact to the judgment of the court; under the act, Code, ch. 163, § 9, p. 629. An exception taken to the judgment of the court must state the facts proved, not the evidence: And it will be treated as governed by the principles applicable to exceptions taken to the opinion of a court overruling a motion for a new trial, on the ground that the verdict is contrary to the evidence.*

This was an action of detinue in the Circuit court of Brooke county, brought by Oliver Pryor against Adam Kuhn, to recover a quantity of glass ware. Both parties claimed under Metcalf, Miller & Co. who were manufacturers of glass. When the cause was called for trial, the parties waived a jury and submitted the case to the court; and the evidence being heard, the court gave a judgment in favor of the defendant. The plaintiff excepted to the judgment of the court, and spread all the evidence upon the record. The partners Metcalf and Miller, were examined as witnesses. It appeared that they owed the plaintiff Pryor about one thousand eight hundred dollars, and Miller called upon him and proposed to sell him glass to the amount of the debt. He agreed to take it, and went to their place of business and checked off in the margin of their invoice book articles of glass ware, the most of it in boxes, to the amount of one thousand eight hundred and sixty-six dollars. From Miller's tes-

* The act provides, that "in any case, except a case of felony, in which a trial by jury would be otherwise proper, the parties or their counsel, by consent entered of record, may waive the right to have a jury, and thereupon the whole matter of law and fact may be heard and determined, and judgment given by the court."

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timony, it would appear that Pryor was to take all the ware so checked off; and that the items on the book so checked contained all the ware of the kind then owned by Metcalf, Miller & Co. Metcalf, however, stated that Pryor was only to take of the glass checked off enough to pay his debt. After a part of the glass had been sent to Pryor, some of the sureties of Metcalf, Miller & Co. objected to it, and they thereupon declined to send the balance; and executed a deed conveying their property, including the glass, to Kuhn, in trust to pay their debts.

Upon the application of Pryor, this court granted a *supersedeas* to the judgment.

Russell, for the appellant.
Jacob, for the appellee.

SAMUELS, J. This case is brought here by writ of error to a judgment of the Circuit court of Brooke county, in an action of detinue, wherein Pryor was plaintiff and Kuhn defendant. The specific property sought to be recovered was a large quantity of glass ware; both parties claimed to have acquired title to the ware from Metcalf, Miller & Co. the manufacturers. Pryor claimed under a purchase, which he alleged and attempted to prove was complete, so that nothing further remained to be done by the parties to the sale or either of them, to ascertain the goods bought, the price, or any other element of a complete sale; but that it only remained to deliver the goods in the mode agreed on between the parties. A portion of the goods alleged to have been purchased were retained by Metcalf, Miller & Co. and conveyed and delivered to Kuhn the defendant, as trustee in a deed of trust.

The parties acting under the statute, Code of Virginia, p. 629, § 9, waived a trial by jury, and submitted the case to the court in lieu of a jury. The

court, after hearing the evidence, found the issue in favor of the defendant, and rendered judgment accordingly. The plaintiff moved the court to set aside its finding, and to find for the plaintiff; the motion was overruled, and an exception was taken to the opinion of the court. This exception sets out minutely the evidence of the witnesses on both sides. Looking to the evidence of the exceptor alone, it would be a question of some doubt whether the price of the goods in question had been agreed on by the parties, and whether it did not remain to make the selection of goods, or a part of them, from the stock on hand. Looking to the evidence of the defendant, it appears that the selection had not been made nor the price agreed upon. Thus, if we allow to the plaintiff's evidence all the weight ascribed to it in the argument here, and that it would show a complete sale, if uncontradicted, yet the evidence of the defendant, equally strong at least, if standing alone, would show that the sale was not complete. Thus the question is presented whether this court shall engage in weighing the conflicting evidence, in order to find the facts on which to declare the law.

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No case in this court has gone so far as to hold that the court can or ought to notice a bill of exceptions to the opinion of a court overruling a motion for a new trial, setting out contradictory evidence, for the purpose of determining which side preponderates. In *Bennett v. Hardaway*, 6 Munf. 125, it was held that the facts of the case, as they appeared in proof, should be set forth in the exception as facts; and in that case the exception was disregarded, because it contained only the evidence, which was conflicting in itself.

In *Carrington v. Bennett*, 1 Leigh 340, the bill of exceptions set forth the facts, as facts, so far as they were directly proved upon the trial. Those facts, however, did not directly prove the gaming consideration of the

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bond, the question in issue between the parties; they afforded, however, strong circumstantial proof to show that the bond was given for such consideration; and there was no conflict in the evidence. This court decided that it would draw the inference which was plainly deducible from the facts: And having by this process ascertained that the bond was tainted with a gaming consideration, reversed the judgment of the court below, and awarded the defendant a new trial.

In *Ewing v. Ewing*, 2 Leigh 337, the bill of exceptions set out all the evidence on both sides in which there was no conflict. It appeared that if all the evidence of the exceptor should be excluded, and the truth of all the evidence on the other side be admitted, still the verdict would not be sustained by proof: And this court thus ascertaining the facts, awarded a new trial. A like rule was observed in the cases of *Green v. Ashby*, 6 Leigh 135; *Rohr v. Davis*, 9 Leigh 30; *Pasley v. English*, 5 Gratt. 141.

In *Mays v. Callison*, 6 Leigh 230, the question was whether the court below intended to certify the facts, or the evidence merely; and this court being of opinion that the facts had been certified, the exception was held to be well taken.

The rule in *Bennett v. Hardaway* was adhered to in the cases of *Jackson's adm'x v. Henderson*, 3 Leigh 196; *Callaghan v. Kippers*, 7 Leigh 608; *Forkner v. Stuart*, 6 Gratt. 197.

Thus, I conceive the rule declared in *Bennett v. Hardaway* must govern any case in which it would be required of this court to do more than to draw obvious inferences from proved facts; or in which the exceptor is not prepared to waive his own evidence and rely upon the insufficiency of that given on behalf of his adversary, admitting its truth, to sustain the verdict.

If the case before us be tried by these tests, it will

fall within the rule established in *Bennett v. Hardaway*, because at best the exceptor's evidence somewhat vaguely proves a sale; whilst that of his adversary more distinctly proves that several elements of a complete sale did not exist.

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It has been said, however, that the statute, Code, p. 629, § 9, giving the courts authority to try issues of fact, places them in the position of courts when trying facts in cases of probat, roads, mills and the like; and that an appellate court may review the decision of an inferior court in such cases upon a certificate of evidence only, even if contradictory; and that this case, like others of the class to which it is alleged to belong, may be reviewed here upon a certificate of contradictory evidence. If it be conceded that a difference is permitted in the form and substance of an exception taken in a case of the class above named, and one taken upon the trial of an issue in a suit, and that this case belongs to the class of probat, &c. yet the result of this case must be the same; for even in cases of that class, the decision of the court below, on conflicting evidence, would be followed by the appellate court, unless error should plainly appear; which cannot be said to exist in this case.

I am of opinion, however, that the legislature, when it authorized a court in place of a jury, to try issues of fact, did not intend to change the practice beyond that precise point, and especially did not intend to change the practice in the appellate courts. The terms of the statute do not require such change; no reason occurs to my mind why it should be made; on the contrary, I perceive very good reason why an inferior court trying issues of fact, should be held to greater strictness in certifying facts proved to its own satisfaction, than in case of a trial by jury. Such court knows with absolute certainty the facts which

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it regarded as proved, and many therefore certify them as such, however contradictory the evidence may be.

The judgment of a court of original jurisdiction, in any case, is pronounced upon a state of facts ascertained upon the trial of such case. It is the duty of an appellate court, in reviewing the judgment of the inferior court, to regard such judgment in reference to the facts upon which it was founded in the opinion of the inferior court. If, however, the appellate court should be required to engage in a new investigation of the facts, it might arrive at a result different from that of the inferior court; and that a judgment of the inferior court, perfectly correct on the facts as they appeared to that court, might be reversed only because the appellate court found a different state of facts. Thus it would result that the appellate court must finally pass upon questions of fact, and this with means far inferior to those of the court which heard the witnesses, and which had other means of deciding which are denied to the appellate court. The legislature, I conceive, could not have intended to impose upon this court the duty of revising the action of the Circuit court in regard to questions which the Circuit court had better means of deciding correctly than those which are allowed to this court.

I am of opinion to affirm the judgment.

MONCURE, J. The certificate in this case is of the evidence introduced, and not of the facts proved on the trial; and would therefore be insufficient to enable this court to revise the judgment, if the case had been tried by a jury.

But the parties, by consent entered of record, having waived the right to have a jury; thereupon the whole matter of law and fact was heard and determined, and judgment given by the court, in pursuance of the Code, ch. 162, § 9, p. 629.

The principle which requires a certificate of facts instead of evidence to enable an appellate court to revise a judgment of an inferior court upon a motion for a new trial of an issue tried by a jury, does not, I think, apply to the revision of a judgment of an inferior court upon the whole matter of law and fact, without the intervention of a jury.

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In jury cases, the provinces of the court and jury are distinct. A line of separation is drawn between the law and fact; one side of which belongs to the court, and the other to the jury. Neither can cross the line and invade the province of the other. The jury must receive the law from the court, and the court must render judgment on the facts as found by the jury. The court, under certain limitations, may grant a new trial; but that is the utmost extent to which it can interfere with the verdict. It cannot render a different judgment on the facts, but must ultimately render judgment on the verdict of the jury upon them. An appellate court in this state, contrary to the practice which generally exists elsewhere, will revise the judgment of an inferior court on a motion for a new trial; but it must generally have the facts before it, and not the evidence only. It will not weigh evidence and ascertain facts; but will only apply the law to facts already ascertained. It therefore generally declines to act in such cases upon a mere certificate of evidence. To the judgment of a court in a jury case a writ of error lies only upon matter of law.

But to the judgment of a court which tries the whole case, including law and fact, a writ of error lies as well upon the fact as upon the law. All judgments of inferior courts, except when the matter in controversy is merely pecuniary and of small value, may be revised by an appellate court upon an appeal or writ of error. The appeal or writ of error is to the whole

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judgment, whether it involve matter of law only, or be compounded both of law and fact. Ordinarily a judgment in a civil case involves only a matter at law. But whenever the decision of the whole case is referred by law to an inferior court, its judgment is compounded both of law and fact, and may be revised in respect to both by the appellate court. Chancery cases, controversies concerning the probat of a will or the appointment or qualification of a personal representative, guardian or committee, or concerning a mill, county road or ferry, and motions generally, in which the court decides the whole case without the intervention of a jury, belong to this class. In all these cases the evidence must, in some form, be before the appellate court to enable it to revise the judgment of the inferior court. Where an appeal is matter of right, and is from a County to a Circuit court, it may be heard in the latter on evidence *viva voce*. In chancery cases the evidence is generally in the form of depositions, and is necessarily a part of the record. In all but chancery cases, the evidence is generally made a part of the record by bill of exceptions to the judgment of the court, the evidence at large, and not the facts proved in the opinion of the inferior court, being set out in the bill. 1 Rob. Pr. 591; *Mayo, &c. v. Hunter*, 2 Munf. 228. Where the evidence in both courts is *viva voce*, documentary, or in the form of depositions, the appellate court has the same advantage in revising, that the inferior court has in rendering, judgment upon the facts. Where there is before the appellate court a mere certificate of parol testimony heard before the inferior court, the former has not the same advantages with the latter in the decision of the case; but still has a capacity to decide it. The appellate court may stand upon the same ground in regard to the bill of exceptions in such a case that it occupies

in relation to a demurrer to evidence in common actions. 1 Rob. Pr. 591; *Grays v. Turnpike Company*, 4 Rand. 578. And if so, it will consider the case as if the appellant had admitted all that can reasonably be inferred from the evidence given by the other party, and waived all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. This is certainly the most favorable view which can be taken of the case for the appellee, and is perhaps more strongly in his favor than ought to be taken. The reason of the rule applied to a demurrer to evidence is that the demurrant, without the consent of his adversary, withdraws the decision of the facts from the jury, to whom it properly belongs. No such reason applies to a case in which the law refers the decision of the facts to the court. A more reasonable rule in all such cases would seem to be that which has been applied by this court to cases of probat, and which requires it, on a mere question of credibility of witnesses, always to presume that the inferior court, which saw and heard the witnesses examined, decided correctly. *Dudleys v. Dudleys*, 3 Leigh 436.

I presume there can be no doubt but that in ordinary cases, triable by the court both upon the law and facts, the judgment of the court may be revised by an appellate court upon a bill of exceptions setting out the evidence at large. The only question then, is, whether this case stands on the same footing in that respect with ordinary cases? I think it does. The only reason for a contrary opinion seems to be that by the provision in the Code, ch. 162, § 9, p. 629, under which this case arose, the whole matter of law and fact is referred to the court only in cases in which the parties or their counsel, by consent, entered of record,

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waive the right to have a jury; from which it is inferred that in such cases the parties are bound by the judgment, as by an award of an arbitrator of their own choosing; or else that by their consent the court is substituted to the place of a jury, and its judgment on the facts to the place of a verdict, so that there is the same necessity for a certificate of facts, instead of evidence, to enable an appellate court to revise the judgment as in the case of an ordinary verdict. I think this is a *non sequitur*; and that the only effect of the consent required in such cases is to waive the right to have a jury, to which the parties are entitled. But for such right, of course no such waiver would have been required; but the law would simply have provided that the whole matter of law and fact should be heard and determined, and judgment given by the court; and then the cases would have stood on the same footing, in every respect, with other cases of which the court has entire cognizance. The waiver of the right places these cases on the same footing as if the right had never existed. It would be strange if the fact that the right once existed should deprive parties of the advantage of having the judgment supervised, which they would have had if no such right had ever existed. The effect of such a construction would be, not only to deprive them altogether of the advantage of having the judgment on the facts supervised, but greatly to impair their right to have the judgment on the law supervised by an appellate tribunal. In jury trials, the mode of placing the judgment of the court upon a question of law arising in the course of the trial on the record for the supervision of an appellate tribunal, is by bill of exceptions to the opinion of the court upon that question. In court trials, except of chancery causes, the only mode is by bill of exceptions to the whole judgment. If the facts

only must be set out in the bill to authorize the appellate court to supervise the judgment, it is obvious there must be many cases in which the judgment cannot be supervised either upon the law or upon the facts. There are many cases in which the court cannot, or will not, certify the facts; as where the evidence is conflicting, or complicated, or of doubtful credibility. The difficulty of setting out facts, instead of evidence, in the hurry and confusion of the business of the court, has given rise to our practice of setting out evidence instead of facts in demurrers to evidence.

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It is still generally necessary to set out facts, instead of evidence, in a bill of exceptions to an opinion of the court overruling a motion for a new trial. But this rule leaves unaffected the right of the parties to have all the opinions given by the court in the course of the trial, supervised; and affects only their right to have the judgment on the motion supervised. This latter is a limited right, existing in this state only where the inferior court will certify the facts, and generally not existing at all elsewhere. It may be said that a court which has to decide upon the facts must be able to certify them. But a court may be able to render judgment in a case without being able or willing to state in detail all the facts proved by a mass of complicated, doubtful or conflicting evidence.

I think the legislature designed to place these cases on the same footing with other cases in which the whole matter of law and fact is heard and determined by the court; and to subject the judgment of the court, both upon the law and fact, to the supervision of an appellate tribunal. This was certainly the design of the revisors, as will appear from a note to their report, p. 816; in which they refer to the case of a will offered for probat; and to all cases of motion in which the whole case of law and fact may be, and generally

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is, determined by the court; and in which they say, "The right of exception to the judgment of the court will be preserved; it will be merely to the judgment of the court, instead of being, when the trial is by jury to the admissibility of evidence, or to instructions given or refused, or to the decision on a motion for a new trial. One great advantage, where the parties waive the trial by jury, will be that where the court above reverses the judgment of the court below, either for matter of law or fact, there will be no necessity to send the case back for a new trial." With this note before the legislature, they adopted literally, the provision reported by the revisors on the subject; and must, I think, be considered as having done so with the intention expressed in the note.

I have expressed my views of this case at length, because it is a case of first impression, and of great importance. In the *result*, I concur with the rest of the court. There is a conflict in the testimony. If so much of the plaintiff's evidence as is in conflict with that of the defendant be rejected, the plaintiff is not entitled to recover. The court below decided in favor of the defendant. And the judgment must, I think, be affirmed, upon any principle that can be applied to this case. If the rule which governs demurrs to evidence be applicable, then the testimony of the plaintiff which conflicts with the defendant's must be rejected. If the rule which governs this court in the revision of a case of probat be, as I think it is, applicable, then, there being a conflict of testimony, this court will presume that the court below, which saw and heard the witnesses examined, decided correctly. In either view, the judgment must be affirmed. That the conflict does not necessarily involve the veracity of the witnesses, but may proceed from defect of recollection, does not, I think, affect the

case. The court below, which saw and heard the witnesses, must have had a better opportunity of deciding the case correctly than this court can have, whether the conflict proceeded from defect of veracity or of recollection.

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The other judges concurred in the opinion of SAMUELS, J.

JUDGMENT AFFIRMED.

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(Absent SAMUELS, J.*)

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1. Testator says, "It is my will and desire that my just debts be paid out of my estate by my executors hereafter mentioned." The debts are not thereby charged upon testator's real estate.
2. Executor having exhausted the personal estate in payment of debts, and being largely in advance to the estate for payment of debts which bound the heirs, is entitled to stand in the place of the creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the death of the testator.
3. A life estate in lands having been given to the widow in lieu of dower, and being of less value than her dower would have been, her life estate is not to bear any part of the burden of paying the debts.
4. The remainder, after the death of the widow, in the land devised to her for life, having been given to some of the devisees, their proportion of the debts is according to the value of their interest at the death of the testator.
5. The shares of some of the devisees in said remainder, are charged with the payment of certain legacies. The present value of the legacies at the death of the testator is also to be abated from such present value of the remainder, and the proportion of the debts is according to the value of the remainder so ascertained.
6. The legacies charged upon the remainder in the land, are to bear a proportion of the debts according to their value at the death of the testator.
7. The sum which at compound interest will produce the amount of the legacy at the death of the widow, is the present value: And the widow being dead, the period of her death is the time for the payment of the legacy.
8. Advancements made by the testator in his lifetime are not to be taken into the account in fixing the proportion of the debts which each devisee is to pay.

* He had been counsel in the cause.

9. Under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable. The assignment will only be allowed to stand as a security for the true amount for which the legatee is liable.
10. The legacy not being payable until the termination of a life estate, and the legatee being very needy; on that ground, too, the assignment will be held only as a security for the amount due from the legatee to the executor.

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Robert Gaw died in 1829, having first made his will, which was duly admitted to probat in the County court of Shenandoah. He was a merchant doing business in Woodstock; and owned several houses and lots in the town, and a farm adjoining, called the Brubaker farm.

By the first clause of his will he says: "It is my will and desire that all my just debts be paid out of my estate by my executors hereafter mentioned." After directing that his mercantile business shall be continued for three years, and stating what advancements he had made to certain of his children, with which they were to be charged, he gives to his son Jacob R. Gaw a house and lot and an out lot; to his daughter Rebecca H. Gaw, other houses and lots; to Catherine Smith, a girl who had been raised by him, a house and lot during her life. He gives to his wife Rebecca Gaw one-third of the Brubaker farm during her life; and he gives the other two-thirds of that farm to his daughter Elizabeth Crawford, and his sons John Gaw and Robert Gaw, jr. for the life of his wife; and at her death, he gives the whole farm to them, subject to the following charges, viz: That after the death of his wife, Elizabeth Crawford was to pay Mary Huffman, another daughter of the testator, five hundred dollars, and the like sum to Rebecca H. Gaw; and John Gaw was to pay the like sum to these two daughters; which sums the testator made chargeable on the land. The

1855. residue of his estate, including the remainder in the house and lot given to Catherine Smith, he gave to be equally divided among his children; and he appointed Jacob R. Gaw and David J. Crawford his executors.

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Huffman. Crawford, who was the acting executor, seems to have closed his administration prior to 1836. In that year his administration account was settled, and a balance of three thousand one hundred and seventy-one dollars and seventy-eight cents, as of the 5th of February of that year, was reported in his favor. In this account the commissioner allowed the executor's commissions, and Crawford seems to have shared them with his coexecutor.

It seems to have been supposed by the parties, that each of the children was bound to pay an equal part of the amount for which Crawford was in advance to the estate; and he having purchased of John Gaw his interest in the Brubaker farm, and thus become liable to pay the legacies left to Mary Huffman and Rebecca H. Gaw, an arrangement was made with them, whereby they conveyed to Crawford so much of their said legacies as would satisfy their proportion of the debt due to him, which was fixed at one-fifth for each of them, and also some debts due to Crawford from them on individual transactions. These arrangements were made whilst Mrs. Barbara Gaw was still alive; and she lived until June 1846.

In January 1848, Mary Huffman instituted a suit in equity against the executor of Crawford and the heirs of himself and his wife, who had died in his lifetime, seeking to recover the legacy left to her by her father, and which had been made a charge upon the interest of Mrs. Crawford and John Gaw in the Brubaker farm. In this suit the other children of Robert Gaw were parties; and Rebecca H. Gaw filed a cross bill in the cause to recover her legacy.

The cause came on to be heard in September 1849,

when the court held, that the will of Robert Gaw did not charge his real estate with the payment of his debts; but that Crawford's representatives were entitled to charge the real estate for so much of the amount due to him as was in payment of debts binding the heirs. That the land of each of the devisees was to be charged with the debts in proportion to its value at the time of the testator's death; and the incumbrance of the widow's life estate in any part of it was to be taken into consideration in estimating its value. That the legacies to Mary Huffman and Rebecca H. Gaw were to abate in the proportion which said legacies bore to the value of the two-thirds of the Brubaker farm on which they were charged. And a commissioner was directed to settle the accounts of the executors of Robert Gaw, disallowing commissions, and ascertain the amount which Crawford had paid of debts binding the heirs, and to apportion the same among the devisees according to the principles of the decree. And the commissioner was further directed to state the account between Crawford and Mary Huffman and Rebecca H. Gaw; and the assignments made by them of their legacies to Crawford were to stand as a security for what they respectively owed to his estate. And by consent of the parties, the property devised to Catharine Smith was not to be charged with any portion of the debts, and the bill was dismissed as to her.

The commissioner made his report, from which it appeared that after excluding the credit for commissions, there was due to the executor Crawford on the 3d of June 1846, the date of Barbara Gaw's death, the sum of three thousand four hundred and thirty-five dollars and twenty-seven cents, of which two thousand and seventy-six dollars and sixty-one cents was principal. In ascertaining the present value of the interests in the Brubaker farm devised to the testator's

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three children, after the death of Barbara Gaw, the value of her life estate was estimated up to the time she actually lived after the death of the testator; and so also in estimating the present value of the legacies directed to be paid at the death of Barbara Gaw. And the sum which at the death of Barbara Gaw put out at compound interest would in the first case produce the estimated value of the widow's one-third of the land, and in the other would bring the legacy of one thousand dollars, at the death of the widow, was taken as the present value of the widow's thirds, and the legacies. And deducting the value of the life estate of Mrs. Gaw from the whole value of the farm, the one-third of the balance was the amount of Robert P. Gaw's interest in the farm, and the further deduction of the present value of the legacies from the two-thirds of the farm devised to Mrs. Crawford and Jacob R. Gaw, gave the amount of their interest in it. And having thus ascertained the value of the estate and legacies given to the different children, the debt due to Crawford was ratably apportioned among them.

The commissioner also stated the account between the executor Crawford and the legatees, by which it appeared that there was due on the 3d of April 1850 to Mary Huffman, after charging her with her proportion of the debt due to the executor, the sum of six hundred and twenty-five dollars and eighteen cents, and to Rebecca H. Gaw, after the like charge, the sum of two hundred and sixty-five dollars and forty cents: That Jacob R. Gaw's proportion of the debt due to Crawford was, on the 3d of June 1846, seven hundred and twenty-eight dollars and fifty-five cents, and of Robert P. Gaw, eight hundred and eighty-one dollars and fifty cents, on which there had been a payment, leaving but one hundred and thirty-one dollars and nineteen cents due in June 1846.

The commissioner's report was excepted to, because

of the mode in which the present value of the legacies was ascertained; and because the advancements to the children were not taken into the estimate in fixing the amount of the debt to Crawford which each party was to pay.

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In September 1850, the cause came on to be finally heard, when the court overruled the exceptions to the report, and made a decree in favor of the legatees against Crawford's representatives, and in favor of the said representatives against Jacob R. Gaw and Robert P. Gaw for the sums reported by the commissioner. From this decree Jacob R. Gaw applied to this court for an appeal, which was allowed.

Baldwin, for the appellant.

Patton and Stuart, for the appellee.

MONCURE, J. I think there is no error in the decree of the Circuit court.

The will of Robert Gaw does not charge his real estate with the payment of his debts. Whether such a charge is created by a will, is always a question of intention depending upon the construction of the whole will. It is so natural to suppose that a man in that solemn act intended to be just, that courts have taken very slight words in a will to imply a charge upon lands. Carr, J. in *Downman v. Rust*, 6 Rand. 587. "Courts of equity (said Lord Lyndhurst) have always been desirous of sustaining charges by implication for payment of debts, and the presumption in favor of them is not to be repelled by any thing short of clear and manifest evidence (from the will) of a contrary intention." *Price v. North*, 1 Philips' R. 85. It has therefore been established, as a general rule, that a direction by a testator that his debts shall be paid, charges them by implication on his real estate, either as against his heir at law or devisee. Ram on

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Assets, ch. 4, § 2, p. 57, 8 Law Libr. 39; Leading Cases in Equity 71, Id. 247. To this general rule there are exceptions; one of which is, where the debts are directed to be paid by the executors. "If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control. If the executor is pointed out as the person to pay, that excludes the presumption that other persons not named are to pay." 2 Story's Equ. Jur. § 1247. When the executor is devisee of the real estate, a charge upon it will be generally implied by such a direction. But this will not be the case where the estate is specifically devised to a person who happens to be one of the executors. And even where the executors are also devisees, a mere general introductory direction to the executors will not operate as a charge if it is manifest from the whole will that it was not so intended. 2 Spence's Eq. Jur. 321, 322, 71 Law Libr. 249, and cases cited.

There is no difficulty in the application of these principles to the case before us. The first clause of the will which creates the charge, if any, is in these words: "1st. It is my will and desire that all my just debts be paid out of my estate by my executors hereafter mentioned." The words "out of my estate" are the only words in this clause which makes it peculiar, or can afford any room for doubt. Strike out these words, and the clause is in a very common form, the construction and effect of which, standing by itself, is well settled. It would charge only the estate in the hands of the executors. I have found no case in which the will contained these words. But I do not think they alter the sense of the clause. They do not mean the whole estate, but that portion of it which would come to the hands of the executors as such;

the funds with which they were intrusted, and not other funds over which they had no control. This, I think, would be the true construction of the clause, standing by itself and unaffected by the context. But looking to the context for aid in its construction, there can be no doubt about it. By the 12th clause of the will the testator directs all his personal estate, except merchandise, to be sold by his executors for the payment of his debts, and gives them full power to sell his slaves, if necessary, for that purpose. This was the estate to which the testator doubtless referred in the first clause of his will; and it afforded, in his estimation, an ample fund for the payment of his debts. He had no idea that it would be necessary to sell any part of his real estate for that purpose. If by the first clause of his will he had merely directed his debts to be paid, without more, the implication of a charge upon his whole estate would not have been repelled by the 12th clause. But having directed them to be paid out of his estate by the executors, important light is shed upon the meaning of these words by that clause.

The first clause then is to be construed as if it had been a mere direction that the debts should be paid by the executors; and in order to ascertain out of what part of the estate it was intended they should be paid, it was only necessary to inquire what part of the estate would come to the hands of the executors as such. The whole personal estate would come to their hands; and that of course was charged by the will, as it was by the law. But none of the real estate would come to their hands or under their control; unless, perhaps, the house and lot devised to Catharine Smith for life, which was directed after her death to be sold, and the money arising from the sale to be equally divided among the children of the testator named in the will. It would be the duty of the ex-

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cutors to make that sale, no other persons being appointed by the will for the purpose. Whether the proceeds of that sale would be applicable to the payment of the debts under the first clause of the will, is unnecessary to be determined in this case, as no question is raised on the subject. It does not appear what has been done with that property; though the presumption is that the life tenant yet lives and has it in her hands. By consent of parties, the property devised to her for life was not charged with any portion of the debts, and the suit was dismissed as to her. It will be time enough after her death to determine the proper disposition to be made of that property, or the proceeds of the sale thereof. All the other real estate of the testator was given directly to the devisees, without any interposition of the executors, express or implied. A portion of it, it is true, is given to the appellant, who is one of the executors; but is given to him in his own right, and not as executor. And we have seen that where an estate is specifically devised to a person who happens to be one of the executors, it will not be charged with the debts of the testator by a mere direction to the executors to pay them. But certainly the devisee in such case ought to be the last person to complain that the land devised to him was not held to be so chargeable.

It having been ascertained by the commissioner's report in the case, that, after exhausting the personal estate of the testator, there still remained due to his executor David Crawford, on account of debts of the estate paid by him, a balance of three thousand four hundred and thirty-five dollars and twenty-seven cents, including interest to the 8d of June 1846; and it having been ascertained, or conceded, that the said executor had paid more than that amount of specialty debts binding the heirs, he was entitled to stand in the place of the creditors whose debts he had paid, and to charge

the said balance upon the real estate of the testator; which was liable therefor in the hands of the devisees, in proportion to the value, at the death of the testator, of the estate devised to each of the devisees respectively. The widow was not chargeable with any thing on account of the said balance in respect to the devise to her; which was in lieu of, and of less value than, her dower. The incumbrance of her life estate was properly taken into consideration in estimating the value of the real estate; and the value of the said life estate was properly ascertained, and deducted from the value of that part of the estate of the testator to which it was attached. Indeed, there was no exception to the report of the commissioner, and no complaint of the decree of the Circuit court in this respect.

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I think that the legacies of one thousand dollars each to Mary Huffman and Rebecca H. Gaw, charged upon the two-thirds of the Brubaker farm devised to Elizabeth Crawford and John Gaw, were subject to be abated on account of the balance due to the executor Crawford, and chargeable on the real estate of the testator; and that the portion of that balance for which the said two-thirds were liable, was apportionable between the proprietors of the said legacies and of the said two-thirds, the rate of apportionment being the proportion which the value of said legacies at the death of the testator, bore to the residue of the value of said two-thirds at that period, after deducting therefrom the said value of the legacies. There was at least as much reason in laying the charge upon the said legacies as upon the residue of the said two-thirds of the Brubaker farm. The legacies constituted a part of the subject of the said two-thirds, and were carved out of it. They were certainly not more specific in their nature than was the residue of the subject, and not more entitled to exemption from liability for the debts of the testator.

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Huffman. I think the mode, adopted by the commissioner, of ascertaining the value of the said legacies at the death of the testator, (by ascertaining what amount improved at compound, instead of simple interest, from that time until the death of the widow, when the legacies were payable, would be equal to the amount of the legacies,) was correct. That mode, in its application to such cases, received the sanction of the judges of this court in *Wilson v. Davisson*, 2 Rob. R. 384.

But I do not see how the mode of ascertaining the value of the legacies at the death of the testator can affect the appellant; as its only object is to ascertain the rate of apportionment between the two legacies of one thousand dollars each, and the residue of the subject on which they are chargeable. The portion of the balance due to the executor Crawford, for which that subject is liable, cannot be increased or diminished by the mode of its apportionment among the different interests in the subject. The only persons affected are the proprietors of those interests; and they do not complain.

I think the advancements made by the testator in his lifetime to his children were properly not taken into consideration in the apportionment of the balance due to the executor Crawford; and that the said balance was chargeable only on the real estate left by the testator at his death. The only ground for contending that the advancements ought to be considered in the said apportionment is, that they are directed in the will to be accounted for with the executors in the settlement and division of the estate; from which it is inferred that the testator intended to make all his children equal in the distribution of his estate. It is obvious that this direction does not refer to the specific devises of property made to his children respectively, but only to the residue of his estate undisposed of, which, by the 14th clause of his will, he directs to

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be equally divided among his children; and perhaps also to the money arising from the sale of the house and lot devised to Catharine Smith for life, which, by the 13th clause of his will, he also directs to be equally divided among his children. The executors would have to make the former, and perhaps the latter, of these two divisions; and in making them, he wished the advancements referred to in his will to be accounted for with them. But they would have nothing to do with the real estate specifically devised to some of his children, nor with the sums of money charged on a part of it in favor of his daughters Mary Huffman and Rebecca H. Gaw; and therefore the direction to account for the said advancements with the executors, in the settlement and division of the estate, cannot apply to the said real estate and sums of money, which would not come to the hands of the executors, and as to which no settlement or division would be made. The property advanced by the testator to his children in his lifetime was not a part of his estate at his death; and there is nothing in the will to affect the legal liability of the devisees, which is in proportion to the value of the property devised to them respectively.

In the assignments made by Mary Huffman and Rebecca H. Gaw respectively to David Crawford, they acknowledge themselves indebted to him, each in one-fifth of the balance due to him on his executorial account; and agree that their legacies shall be liable for the payment of the same respectively. Rebecca H. Gaw's due proportion of the said balance was in fact about one-fifth; but Mary Huffman's was much less than a fifth. I think the Circuit court properly regarded these parties as liable only for their due proportions of the balance, notwithstanding the assignments; and properly decreed the assignments to stand as security only for what they respectively owed to David Crawford's estate. The purpose both of the assignors and

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assignee was to secure only what was really due. They were mutually mistaken as to the proportion in which the devisees were bound to contribute to the payment of the debt, supposing them to be bound equally, instead of in proportion to the value of the estate devised to them respectively, and the assignments were executed under that mistake. They cannot be regarded as voluntary obligations, nor as admissions or compromises of asserted or disputed claims. They were without consideration, and therefore void, as to the excess of one-fifth of the said balance, over what was really due by the assignors respectively. See 1 Story's Equ. Jur. §120-137, and notes; 2 Evans' Pothier, Appendix, No. xviii.

There are other considerations which render the assignments, and especially that of Mary Huffman, (as to which only the question seems to be material,) void to that extent. The parties were dealing with expectancies; with future, and not with present interests. Legatees, whose legacies were payable on a future and perhaps remote contingency, were dealing, in regard to them, with the person upon whom their payment would devolve. They were indebted to him, and to some extent must have been under his influence. One of them, at least, Mary Huffman, was in very indigent circumstances. In this state of things the utmost extent to which the assignments should be permitted to operate, is to stand as security for what is justly due from the assignors to the assignee. 1 Story's Equ. Jur. §337, 338, 344.

An objection is taken, in the petition of appeal, to the account, as stated by the commissioner, between the coexecutors David Crawford and Jacob R. Gaw. No exception was taken to that account in the court below; and the objection in the appellate court, therefore, comes too late. But I think it is not well founded. It appears to rest only on the ground that David Craw-

ford, who was the acting executor, in a former settlement with his co-executor gave him credit for five hundred and three dollars and thirty-one cents, one-half of the commission allowed by the County court commissioner, who settled the executorial account. The commissioner of the Circuit court having disallowed the commission to the executors in their settlement of the executorial account, properly disallowed the credit for one-half of the commissions in the resettlement of the account between the executors. It would have been to the last degree unjust that David Crawford should not only render all the services for nothing, but be compelled, out of his own pocket, to pay one-half of the usual commission to his coexecutor, who rendered no service at all.

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I am for affirming the decree.

The other judges concurred in the opinion of **MONCURE, J.**

DECREE AFFIRMED.

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SAME v. HENDRICKS' adm'r & als.

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1. Bill by a residuary legatee against an administrator with the will annexed and his sureties T and H; the administrator being insolvent. C the son of T has received assignments of a number of the legacies, and claims them as his own; but H insists that they belong to T, and were purchased at a large discount, the benefit of which he is entitled to share. H insists further that C should not be paid these legacies until T or T and C should file a cross-bill against him, and thus give him an opportunity to contest C's right. If C is not entitled to the legacies he is entitled to compensation for purchasing them up. HELD: C is a proper party defendant to the original bill to have his right to the legacies settled. And H and C having filed a cross-bill against T setting up C's right to the legacies, that T could not object to it at the hearing after having insisted on it. And if C held not entitled to the legacies, he should be allowed compensation for purchasing them.
2. One of two sureties of an insolvent administrator purchases up legacies for which the sureties are bound, at a discount. He shall only charge his cosurety for his proportion of what he paid for the legacies and of the expenses of purchasing them.

Barbara McGuire died about the end of the year 1835, having made her will, which was duly admitted to record in the County court of Brooke; and James and Robert Marshel qualified as administrators with the will annexed, with William Tarr and John Hendricks as their sureties. They also qualified as administrators of Francis McGuire with the same sureties. By her will, after some small legacies, she directed the proceeds of the residue of her estate, both real and personal, to be divided into seven parts, one of which she gave to each of her living sisters, and to the families of her brothers and sister who were dead.

In 1842, there was a settlement of the administration account under the order of the court of probat; and according to that settlement the residuum of the estate amounted, on the 31st of May 1842, to eleven thousand one hundred and ninety-nine dollars of principal, and three thousand and seventy-one dollars and sixty-eight cents of interest. About this time the administrators and their two brothers, who were doing business in partnership, failed in business; and in June 1842, they executed a deed by which they conveyed all their property in trust to secure their debts as well social as individual.

The administrators having become insolvent, three judgments were recovered against the sureties for some of the specific legacies left by Mrs. McGuire; which judgments were paid by Tarr; and in December 1843, Hendricks executed a deed by which he conveyed to Tarr a tract of land to secure him for Hendricks' moiety of the money he had paid or might be compelled to pay as surety of the administrators, after deducting from said moiety one-half of the dividend which he might receive on account of said debts from the trust fund created by the Marshels for the payment of their debts.

In 1847, Rebecca Ravenscroft, the sister of the testatrix Barbara McGuire, and entitled under her will to one-seventh of the residuum of the estate, filed a bill in the Circuit court of Brooke county, on behalf of herself and the other residuary legatees of Mrs. McGuire, against James Marshel, the surviving administrator, Hendricks and Tarr the sureties, and the specific legatees, setting out the will, and the settlement of the account under the order of the court of probat, and the insolvency of the administrators, and asking for an account, and that the sureties might be compelled to pay what might be found to be due to her.

The record states that William Tarr filed his an-

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swer, but it does not appear in the record. In May 1847, the cause came on to be heard upon the bill taken for confessed as to all the parties except William Tarr, and upon his answer, when a decree was made, directing a commissioner to take an account of the administration of James Marshel on the estate of Barbara McGuire, and also of the specific and residuary legacies, and who were the residuary legatees and others interested in the estate: And these legatees and others interested, were allowed to appear before the master, and prove their rights or interest in said estate.

In September 1847, the commissioner returned his report. He did not state the administration account, the parties being satisfied with that returned to the court of probat; but taking the residuum of the estate as amounting on the 31st of May 1842 to the sum of thirteen thousand two hundred and seventy-eight dollars and twenty-four cents, he apportioned that sum among the residuary legatees. He gave a list of these legatees, numbering forty-six, and some of these were dead leaving children; and he stated an account with each of them, except the seven children of one sister, showing the payments which had been made to them, and from what fund made. The children of that sister it appeared had been paid in full by the administrator and his sureties. Of the persons claiming this residuum Campbell Tarr, the son of William Tarr, was reported as the assignee of thirty-nine; and he was the assignee of the only specific legatee who had not been paid: The plaintiff and four others of the residuary legatees still held their claims to their legacies.

After the commissioner's report had been returned, the administrators with the will annexed of John Hendricks answered the bill. They do not question the liability of Hendricks as surety of the administrators; but say that the judgments to secure which their tes-

tator executed the mortgage to William Tarr, had not then been paid off by Tarr; and that they had been since paid in great part, from the proceeds of the property conveyed in trust by the Marshels. They say further, that the legacies assigned to Campbell Tarr were in fact the property of William Tarr, paid for by money furnished by him to his son Campbell Tarr, who acted as his agent in the purchases, and who was a young man without means of his own to purchase them; and that having been purchased at a considerable discount, they could only be charged by William Tarr against their testator Hendricks, at the amount paid for them: And they charge that William Tarr, to induce Hendricks to execute the mortgage aforesaid, proposed and agreed that he would purchase in as many of said legacies for which the sureties were liable, as he could obtain, and that Hendricks should participate equally in any profit which might result therefrom.

They insisted further, that if Campbell Tarr was to be considered as the true holder of said claims by assignment, he ought not to be allowed to recover any thing in respect thereof, nor should William Tarr be allowed to recover any thing on account of payments made to Campbell Tarr as such assignee, without first filing his or their bill against Hendricks' representatives, real and personal, alleging and proving said purchase and assignments, and giving said representatives an opportunity to contest said claims.

Upon the filing of the foregoing answer, on the motion of Campbell Tarr, he was admitted a party defendant in the suit, and filed his answer. He denied in express terms that he acted as the agent of William Tarr in the purchase of the legacies, or that William Tarr had any interest in said purchases. He said that at the time the purchases were made, Hendricks and William Tarr were the sureties of the administrators,

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and they were liable as such sureties, as was then supposed, for near twenty thousand dollars ; the various claimants to which were widely dispersed through several states of this Union. That at that time his father and himself were doing business as partners and merchants, and that in consequence of these heavy liabilities their credit was subject to suspicion, and William Tarr was liable to be called upon at any time to pay a large amount when he was least prepared to pay it. That in consideration of these things, and believing that the claims could be purchased upon terms that would indemnify the purchaser for the labor, exposure and expense of hunting them up and buying the said claims, he proposed to William Tarr that if he would loan respondent so much of the money necessary to purchase these claims as respondent had not of his own, that respondent would hunt up the claimants and purchase the claims. That William Tarr agreed to loan him such money as he could conveniently spare from his business; and thereupon the respondent undertook for himself to hunt up and purchase the claims, and succeeded partly with his own money and partly with money borrowed from William Tarr, in purchasing, at immense labor, exposure, trouble and expense, divers of said claims. That in so far as he purchased said claims for himself, he took the assignments to himself. And he refers to the report of the commissioner made in the cause, as showing which of the legacies had been assigned to him.

In September 1850, the report of the commissioner was recommitted by consent, and he returned a report in which several accounts were stated as between the sureties William Tarr and John Hendricks. The fourth statement showed their indebtedness to Campbell Tarr as assignee of the legacies, if they belonged to him, to be six thousand seven hundred and sixty-eight dollars and forty-nine cents. And the fifth statement showed

the indebtedness of Hendricks to William Tarr, if the legacies were purchased for him, to be one thousand eight hundred and seventy-six dollars and sixty-seven cents.

Upon the question, who was the owner of the legacies purchased by Campbell Tarr, this court was of opinion that the evidence showed a purchase for William Tarr. Campbell Tarr was examined by the commissioner as to the prices given for the legacies purchased by him. He gave a detailed statement, from which it appeared that the legacies purchased by him amounted to twelve thousand four hundred and eleven dollars and forty-three cents, for which he gave nine thousand five hundred and ninety-eight dollars and eighty-three cents. And he gave a statement of the time, labor and expence employed in the purchases, and estimated the amount which would be due to him, if acting for another, at eight hundred and eighty-five dollars. The amounts reported by the commissioner were so reduced by payments out of the trust property of the Marshels.

In 1852, William and Campbell Tarr filed a cross bill in the cause against the administrators with the will annexed and devisees of Hendricks. The object of this bill was to have the mortgage given by Hendricks to William Tarr, for the purpose of repayment to William Tarr of the money he had paid for Hendricks, foreclosed, and payment to Campbell Tarr of the amount he claimed as assignee of the legacies aforesaid. They state that the personal estate of Hendricks did not amount to five hundred dollars, and that he had no real estate at his death but that embraced in the mortgage deed. The administrators answered, relying upon the grounds of defense taken in their answer to the original bill.

It appears that the personal estate of Hendricks was less than five hundred dollars, and that was given

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specifically to two of his children: As to his real estate, he directed that one of his sons should keep possession of it until the final settlement of the administration of Mrs. McGuire's estate. That if upon that settlement these sureties had nothing to pay, his real estate should be sold and divided among his children; but if the sureties had to pay any thing, his proportion of the amount should be paid out of the proceeds of the sale of his estate, and the balance of these proceeds divided in the same proportion among his children.

Both causes came on to be heard on the 2d day of September 1853, when the court dismissed the original bill as to Campbell Tarr, and recommitted all the reports made in the cause, to a commissioner, with directions to state various accounts. First. An account with each legatee, showing how much was due from the administrators, and how much was paid by them. Second. An account of all moneys paid to the legatees by William Tarr, including therein such money as was paid by or through Campbell Tarr, and claimed by him in his own right; and when paid. Fifth. An account of all moneys due from Hendricks to William Tarr on account of their joint suretyship for the administrators. And sixth. An account of the reasonable expenses of William Tarr and Campbell Tarr incurred by them in making the purchases of all the claims by them or either of them. And the court holding that Campbell Tarr had no interest in the cross suit, the bill in that case was dismissed as to both plaintiffs, with costs to the defendants. Whereupon William and Campbell Tarr applied to this court for an appeal, which was allowed.

Fry, for the appellants.

There was no counsel for the appellees.

LEE, J. Whether Campbell Tarr is to be regarded as having purchased the interests of the legatees of Barbara McGuire, now claimed by him, on his own account and for his own benefit, or as agent of his father William Tarr, and for the use and benefit of the latter, it was not improper he should be made a party in the case of Rebecca Ravenscroft, the object of which was to obtain a settlement of the estate of Barbara McGuire, and a decree for payment of the various legacies left by her will. Campbell Tarr had taken the assignments of the different legacies purchased in by him to himself in his own name, and was claiming them for his own use; and it appears that in making these purchases he had spent some time and labor, and had incurred various charges and expenses. It was right, therefore, that his claim to the legacies should be adjudicated, and that he should be bound by the decision; and if it should be held that the purchases were in fact for the benefit of his father, and that he held the assignments as trustee merely, still he could not be required to surrender them for the benefit of other persons except upon being reimbursed for his time, labor and expenses. It was therefore proper that he should be a party in this cause, so that the whole matter might be finally adjudicated, and the bill should not have been dismissed as to him when the case was heard and the reference directed.

It is clear that it was proper for William Tarr to convene the representatives of the personal and real estate of John Hendricks, by cross bill before the court, for the purpose of charging upon the real estate the amount for which it was properly responsible by reason of the cosuretyship of Hendricks with William Tarr in the administration bonds given by James and Robert Marshel as administrators of Francis McGuire and Barbara McGuire. Hendricks, by the mortgage of the 18th of December 1843, had charged his land

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with reimbursement to William Tarr of one-half of all he might have paid as such surety; and by his will he had in effect charged all his estate with the payment of his proportion of any deficiency that might be made to appear upon the settlement of the administration accounts. This provision of course enured to the benefit of William Tarr, and his right therefore to come with his cross bill is beyond all doubt. Nor was there any impropriety in Campbell Tarr's being joined with him as a complainant. Campbell Tarr had purchased the legacies and taken the assignments to himself in his own name. He claimed to have purchased them for his own use and benefit. This claim was recognized and acknowledged by William Tarr. Thus Campbell Tarr was apparently concerned in the proper disposition of the proceeds of the real estate of John Hendricks; and if others were interested to show that the purchases were in fact for the use and benefit of William Tarr, still Campbell Tarr might claim indemnity for his services and expenses in obtaining the assignments as the condition of his surrendering them for the benefit of those entitled. And having thus an interest in the subject, it was proper he should be a party. Story's Eq. Plead. § 72, § 153, and n. 3, § 154; 1 Dan. Ch. Pr. 284, 291. The same reason therefore which forbade the dismissal of the original bill as to Campbell Tarr, applied also to the case of the cross bill of William and Campbell Tarr; but there was still another reason which rendered the dismissal of the latter, for the cause assigned, improper at the hearing. The administrators of Hendricks had in their answer to the original bill insisted that Campbell Tarr should not be allowed to recover any thing by reason of the supposed assignments of the legacies to him, nor William Tarr to recover any thing by reason of any payments to Campbell Tarr as such assignee, without first filing their bill against the representatives

of John Hendricks, and alleging and proving the assignments and giving the administrators an opportunity to contest them; and when the cross-bill was afterwards filed, setting up the assignments, neither they nor any other of the representatives of John Hendricks made any objection for such supposed misjoinder by demur-
rer, plea or otherwise. The administrators of Hen-
dricks answered, and the cause came on for final hear-
ing on the merits. The objection not having been
made in due time and in the proper form, should at
this stage have been disregarded. 1 Dan. Ch. Pr. 399,
401; Story's Eq. Plead. § 544. *Raffity v. King*, 1 Keen's
R. 601; *Trustees of Watertown v. Cowen*, 4 Paige's R.
510; *Dickenson v. Davis*, 2 Leigh 401.

Upon the merits, I think there is as little room for doubt or difficulty.

Campbell Tarr was the son of William Tarr, and in his employment or engaged with him in business as a junior partner. He was, so far as appears, without means, except such as he derived from his father. The money with which the purchases of the legacies were made was supplied by his father, and the enterprise of hunting up the legatees and obtaining their assignments was undertaken at his suggestion. The idea that the money used by Campbell Tarr in making the purchases was loaned him by his father, is not supported by any competent testimony, but is repelled by the circumstances disclosed. In making the purchases Campbell Tarr appears to have had constant reference to his father, and speaks of it as his father's busi-
ness. He also speaks of the hardship of the case upon both of the securities, and states his object in making the purchases to be to save them as far as possible; and he uses this as an argument with the legatees why they should consent to an abatement of the amount due them; and the argument appears to have been successful. Looking to all the circumstances in proof,

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1855. the concert of purpose between William Tarr and Campbell Tarr is plainly apparent. That the latter was the mere agent of the former in making the purchases is, I think, beyond any reasonable doubt or question, and as such, for all the purposes of these causes, he must be regarded. The assignments being in his name, he is to be regarded as holding them in trust for his father, and for those, if any, who may be entitled to participate with him in the benefits of them, subject only to the right to demand a reasonable compensation for his services, and reimbursement of his expenses incurred in obtaining the assignments.

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Regarding the purchases of these legacies as in fact made for William Tarr, the claim of the representatives of Hendricks to participate in the benefit of them cannot be successfully resisted. The doctrine of contribution among sureties is founded rather on principles of equity and natural justice than upon any notion of mutual contract, express or implied. *Dering v. Earl of Winchelsea*, 1 Cox R. 318; *Craythorne v. Swinburne*, 14 Ves. R. 160; per Lord Redesdale in *Stirling v. Forrester*, 3 Bligh's R. 575, 590. It is true it may be enforced at law, although no positive contract between the sureties can be shown, but the principle and the measure of relief afforded in the court of equity are different from those of the law courts. Thus, if one of several sureties be insolvent, and another pays the debt, he can at law recover from the other solvent sureties only their original quotas without regard to the share of the insolvent surety. *Cowell v. Edwards*, 2 Bos. & Pul. 268; *Brown v. Lee*, 6 Barn. & Cress. 697; *S. C.* 9 Dow. & Ryl. 700. But in equity the share of the insolvent surety will be apportioned amongst those who are solvent. *Hale v. Harrison*, 1 Cas. in Ch. 246; *Dering v. Earl of Winchelsea*, 1 Cox R. 318; *Peter v. Rich*, 1 Ch. Rep. 34. So if one surety die, the remedy at law lay only

against the survivors; but a court of equity would compel contribution from the estate of the deceased surety. *Primrose v. Bromley*, 1 Atk. R. 89.

Sureties are not only entitled to contribution as between themselves personally, for moneys paid in discharge of the common debt, but they may also claim the benefit of all securities which any one of their number may have taken for his indemnity: And if a surety who seeks contribution has been reimbursed part of what he has paid, either by the debtor himself, or through a counter security, or from any source, he must give credit for the amount reimbursed, and can only claim contribution for the balance. *Knight v. Hughes*, 3 Carr & Payne 467; *Swain v. Wall*, 1 Ch. Rep. 80; 1 Story's Eq. Jur. § 499; Theobald on Prin. and Sur. ch. 11, § 283, p. 267.

From these principles it follows, I think, as a necessary corollary, that if one surety purchases in the common debt for less than its nominal amount, he can only claim contribution of a cosurety for the amount actually paid by him. If it be unjust that one surety should bear the whole burden of a demand to which another, in common with him, has made himself equally liable, and from the payment of which he has derived an equal benefit, so it would be unjust to compel the latter to sustain more than his just and equal share of the necessary loss. The object of the whole doctrine is equity, and equality of burdens is equity.

In *Blow v. Maynard*, 2 Leigh 29, it was held that where a surety for a guardian compromised with the ward for a less sum than was actually due on a settlement of the guardian's account, he could only demand indemnity from the guardian's estate in equity, for the money actually paid to the ward in satisfaction of her claim. *A fortiori*, it should seem he could not demand contribution of a cosurety except for the amount thus actually paid. If the principal be only liable for

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the amount actually paid by a surety in discharge of the debt, then he could only be liable to any other surety for his quota of that amount ; and if the latter could be called on for contribution according to the nominal amount of the debt, he would thus be liable to his cosurety for a greater amount than he could recover of the common principal.

I think, therefore, the estate of Hendricks was only liable to reimburse one moiety of the amount actually paid by William Tarr for the legacies purchased in by him or by Campbell Tarr for him, and one-half of what would be a *just* compensation to Campbell Tarr for his time and services and necessary expenses in looking up the legatees and obtaining their assignments.

I am of opinion to reverse the decree, and remand the causes for further proceedings.

The other judges concurred in the opinion of LEE, J.

DECREE REVERSED.

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1. The Baltimore and Ohio railroad company is a corporation of the state of Virginia; and although its principal office is in Maryland, and its principal officer resides there, it may be sued in Virginia on contracts made here.*
2. A corporation may be summoned and proceeded against as a garnishee, upon proceedings under the Code, ch. 151, § 2, p. 600.*
3. When the word person is used in a statute, corporations as well as natural persons, are included, for civil purposes.*
4. When a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal.
5. It seems that the statute in relation to attachments at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee.*
6. **Quere:** Whether the statute operates at law upon debts, which, though due at the service of the attachment upon the garnishee, are not then payable?
7. The answer of a garnishee speaks of debts due from him to the defendant at the date of the service of the attachment; the jury impaneled to try the question whether the garnishee had disclosed all the debts due from him to the defendant, render their verdict, that the garnishee did not state all the debts which he owed to the defendant at a subsequent specified day and afterwards; but that at such subsequent specified day and afterwards he owed the defendant enough to pay the plaintiff's debt. The verdict is no reply to the answer, and should be set aside.
8. A railroad company having been summoned as a garnishee, and a jury having been impaneled to try whether it has made a full disclosure of its indebtedness to the defendant in the action, the statements of a division engineer to a third person in relation to the indebtedness of the company to the defendant, are not competent evidence; it not appearing that said engineer was the agent of the company having any authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to, so as make his statements part of the transaction, and explaining the nature thereof.

* See the opinion of Judge ALLEN for the provisions of the statutes.

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adm'r's. On the 14th of January 1852, the intestate of the defendants in error instituted an action of assumpsit against Patrick and F. C. Crowley, in the Circuit court of Marion county; and on the same day they sued out an attachment against the estate of the debtors under the provisions of the Code, ch. 151, § 2, p. 600, with an endorsement directing the sheriff to summon the Baltimore and Ohio railroad company as garnishee.

On the same day the sheriff returned that he had summoned the plaintiff in error, by delivering a copy of the attachment to James L. Randolph, agent of said company, and a resident of said county, at the company's office in the town of Fairmont, Marion county; there being no president, director or other chief officer within his county on whom he could serve the same.

On the 18th of May 1852, the defendants in the court below appeared by their counsel, and confessed a judgment for one thousand and sixty-six dollars and seventy-nine cents, with interest from the 14th of January 1852 until paid. The company also appeared by its attorney, and waived publication; and the cause was continued as to it.

At the October term 1852, a motion was made by the company to discharge it from answering to said summons as garnishee, upon the ground that a corporation is not liable as garnishee under the attachment laws of the state of Virginia in the form of proceedings in this cause; which motion the court overruled, and decided that the corporation was bound to answer.

At the May term 1853, the company filed its answer as garnishee, by which it was averred that there are in its hands a certain sum that will be due to Patrick Crowley on his signing a certain release according to the requirements of a contract filed with the answer; that said money is a final estimate for the work done on said contract. That it owed Frederick C. Crowley nothing subject to said attachment; nor was there

any other moneys in the hands of the company at the time of the service of said attachment, only as above stated.

The plaintiff in the court below thereupon suggested that the garnishee had not fully disclosed the debts due by it to, or effects in its hands of, the defendants; and the court ordered a jury to be impaneled to enquire as to such debts and effects.

At a subsequent term a jury was impaneled, and found that the company as garnishee has not fully disclosed the debts due by it to, or effects in its hands of, the said P. and F. C. Crowley; and that there was a sufficient amount due from said company on the 18th day of May 1852, and also afterwards, to the said P. and F. C. Crowley to satisfy the plaintiff's judgment rendered on the 18th day of May 1852, against them in this cause. And the court upon this finding rendered judgment against the company.

During the trial the company excepted to a decision of the court permitting the statements set forth in the bill of exceptions, made by James L. Randolph, a division engineer of the company, to go in evidence to the jury. This statement was, that there was enough in the hands of the company to pay the Gallahue debt, and they would have to pay it in consequence of the attachment. This was stated in reply to an enquiry made by the witness as to the prospect of securing another debt due by the Crowleys to another person.

After the verdict, the company moved for a new trial, which was refused; and the company again excepted; and applied to this court for a *supersedeas*, which was allowed.

A. Hunter, for the appellant.

There was no counsel for the appellees.

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ALLEN, P. after stating the case, proceeded :

The first question arising upon the foregoing statement is, whether a corporation is liable as a garnishee under the attachment law. In the argument here, however, the counsel of the company contended, that no suit whatever could be maintained against this corporation in the courts of Virginia: First, because it is a foreign corporation, and therefore not liable to be sued without the jurisdiction of the state which created it; and second, because no mode is provided by our law for the service of process upon it.

The first ground it seems to me is settled by the act of March 8th, 1827, entitled an act to confirm a law passed at the present session of the general assembly of Maryland, entitled an act to incorporate the Baltimore and Ohio railroad company. The preamble recites that whereas an act has passed the legislature of Maryland, entitled an act to incorporate the Baltimore and Ohio railroad company, in the following words and figures, viz: The act of incorporation is then set out, conferring a corporate name, with all the powers, rights and privileges which other corporate bodies may lawfully do for the purposes mentioned in the said act, and providing that by that name it should be capable of purchasing, holding, selling and conveying property; and may sue and be sued. And after thus reciting the Maryland act of incorporation, the Virginia law proceeds to enact, "that the same rights and privileges shall be and are hereby granted to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland; the said company shall be subject to the same pains, penalties and obligations as are imposed by said act, and the same rights, privileges and immunities which are reserved to the state of Maryland or to the citizens thereof, are hereby reserved to the state of Virginia and her citizens."

The company under this law is a Virginia corporation, and its powers within the territory of Virginia are derived from the grant contained in the Virginia law. The act of Maryland incorporated the subscribers to the capital stock, their successors and assigns, by the name designated; and the Virginia act in effect re-enacts the Maryland law in all essential particulars; thereby erecting the company into a Virginia corporation within her territory. If liable to be sued in Maryland, the same liability attaches to it in Virginia. It is judicially known to the court that the road traverses the territory of Virginia to a greater extent than it does through the state of Maryland. Throughout its whole course vast expenditures would be necessary in the construction, preservation and working of the road, innumerable contracts would be entered into, controversies would necessarily arise out of the contracts, acts and omissions of the company and its agents; and it would be a startling proposition if in all such cases citizens of Virginia and others, should be denied all remedy in her courts for causes of action arising under contracts and acts entered into or done within her territory; and should be turned over to the courts and laws of a sister state to seek for redress. Such a construction would give the company almost entire immunity for its contracts and acts over most of the road, and would exempt its property in the territory of Virginia from all liability to its creditors: For process of execution from the courts of Maryland could not avail in Virginia.

The subsequent legislation of the state shows that the legislature has uniformly treated it as a Virginia corporation, exercising the same controlling power over it as over other corporations deriving their existence from the laws of Virginia. By the act of March 1847, Sess. Acts, p. 86, the company was authorized to complete the road through the territory of Virginia

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over a route thereby prescribed; and by the 6th section of this law it was subjected to the provisions of the general railroad law of the 11th March, 1837, with respect to that portion of the road constructed within this commonwealth, so far as the same were properly applicable; and the company was required to accept the provisions of this act within six months, as a condition upon which the powers and privileges of the said act were granted.

Under this act, as it appears from the preamble of the act of 21st of March 1850, Sess. Acts, p. 49, the company has proceeded to complete its road: Thus, with respect to that portion of the road constructed in Virginia, submitting itself to the provisions of the general law regulating railroad companies incorporated by this commonwealth.

Regarding it as a corporation of Virginia with respect to that portion of the road constructed within the commonwealth, it is unnecessary to consider what would be the effect of our legislation upon this question, even if it were still to be treated as a foreign corporation, to which certain franchises and immunities within the state were granted and liabilities imposed upon it. It has been supposed that a foreign corporation cannot be sued, because by the common law, process against it must be served upon its head within the jurisdiction where this artificial body exists. The difficulty is rather technical than substantial; and this court held in the case of the *Bank of U. S. v. The Merchants Bank of Baltimore*, 1 Rob. R. 573, that under our law directing the method of proceeding against absent debtors in courts of equity; a suit might be maintained even against a foreign corporation where it has lands or tenements within the commonwealth; the proceeding being by publication instead of actual service of process.

It is further argued, that even if the corporation is

to be regarded as a Virginia corporation, its principal office is in Maryland, and its chief officer resides there; and that by the Code, ch. 169, § 1, it is provided that a suit may be brought in any county or corporation wherein, if a corporation be a defendant, its principal office is, or its chief officer resides; another paragraph provides that if the suit be to recover land or subject it to a debt, the suit may be brought in the county or corporation wherein such land, estate or debts, or any part thereof, may be; and the second section authorizes a suit to be brought in any county or corporation wherein the cause of action or any part thereof arose, although none of the defendants may reside therein.

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Corporations are in law, for civil purposes, deemed persons. They have power to plead, be impleaded, grant or receive by their corporate names, and to do all other acts within the purview of their corporate power, which natural persons could do. Holding land in different counties, if so empowered by its charter, it may be sued in the county wherein such land may be, though its principal office is, or its chief officer resides, elsewhere. The cause of action growing out of its contracts, acts, negligences or omissions, may arise in a different county or corporation, and suit may be brought where the cause of action arose, without reference to the residence of the defendant. The Code, p. 643, § 7, prescribes the mode of serving process against or giving notice to a corporation. It shall be sufficient to serve process against it, on the chief officer; or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation, provision is made for service on other officers of the corporation in cases of cities, towns, &c. &c.; and then follows this general provision: "If the case be against some other corporation than a bank, and there be not in the county or corporation wherein it is commenced, any other person

1855. on whom there can be service as aforesaid, service on
July an agent of the corporation against which the case is,
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Balti- be sufficient." As jurisdiction is not confined to the
more and Ohio county or corporation wherein its principal office is, or
R. R. Co. chief officer resides, so service on an agent of the cor-
v. poration within the county where the suit was pro-
Galla- perly commenced, with publication in the prescribed
hue's mode, is sufficient service; there being no president,
adm'r'a. director or other chief officer of said company within
the county on whom process could be served. I think,
therefore, that this corporation may in a proper case
be sued in the courts of this commonwealth, and that
a mode is provided by law for the service of process
upon it.

The next error assigned is, that the court erred in overruling the motion to discharge the attachment, the plaintiff in error insisting that a corporation is not liable as a garnishee, under the attachment laws. The objection is general; applicable to all corporations aggregate, without reference to the jurisdiction of the court over the parties or controversy. The Code, ch. 151, § 2, p. 601, authorizes the plaintiff in an action at law, on proper affidavit at the time of or after the institution of the suit, to obtain from the clerk an attachment, if the suit be to recover money for a claim or damages for a wrong, against the defendant's estate. The 7th section of the act provides that every such attachment may be levied on any estate, real or personal, of the defendant; and that it shall be sufficiently levied by the service of a copy thereof on such persons as may be in possession of effects of or known to be *indebted* to the defendant. By the 9th section, such persons are to be summoned to appear as garnishees. The 12th section gives a lien from the time of service upon the personal property, choses in action and other securities of the defendant, in the

hands of or due from any such garnishee. The 17th section provides that when any garnishee appears he shall be examined on oath. If it appear on such examination, that he was indebted, the court may order him to pay the amount so due by him; or with the leave of the court he may give bond to pay the amount due by him at such time and place as the court may thereafter direct. The 18th section authorizes the court, if he fails to appear, to compel him to appear, or the court may hear proof of any debt due by him to the defendant, and make the proper order thereupon. And the 19th section authorizes a jury to be impaneled when it is suggested that the garnishee has not fully disclosed the debts due by him to, or effects in his hands of, the defendant in such attachment; and provides for a judgment on the finding of the jury.

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From this review of the material provisions of the statute bearing upon this question, there would seem to be nothing in the condition of a corporation to exempt it from being summoned as a garnishee. When the word person is used in a statute, corporations as well as natural persons are included for civil purposes. This was the rule at common law. 2 Inst. 697, 703, 736. They are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. *Beaston v. Farmers Bank of Delaware*, 12 Peters' R. 102, 134-5; *U. S. Bank v. Merchants Bank of Baltimore*, 1 Rob. R. 573; and the Code, ch. 16, § 17, p. 101, clause 13, provides that the word person may extend and be applied to bodies politic and corporate as well as individuals. The general words, as to what effects, debts or estate of the defendant may be attached, would seem to embrace his whole estate, without respect to the character of the person, natural or artificial, in whose

1855. hands the effects were, or by whom the debt was due.
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Baltimore and Ohio like an individual, is liable to be sued by its creditor
R. R. Co. v. or the owner of the property: And the statute merely
Gallagher's admr's. substitutes the plaintiff in the attachment to the rights
of the creditor or owner as against the garnishee. No
change is made in its contract, or additional obligation
imposed on it, by being proceeded against as garnishee.
The only particular in which there is any departure
from a literal compliance with the statute, is in regard
to that provision of the 17th section which declares
that when any garnishee shall appear, he shall be
examined on oath. This clause was for the benefit of
the plaintiff in the attachment. In the case of a cor-
poration, he must receive an answer in the only mode
by which the corporation can answer, under its cor-
porate seal. In chancery, where, as a general rule,
all answers must be verified by oath or affirmation, a
corporation must answer in the same way, though
where a discovery is wanted, a practice has prevailed
of making some of the officers defendants. The same
result could be arrived at under the attachment law,
by examining the officers as witnesses, if the plaintiff
suggests that a full disclosure has not been made.
This is an inconvenience to which he is subjected,
growing out of the character of the garnishee; but
furnishes no reason for exempting the corporation
from being so proceeded against when all the other
words of the statute are sufficiently comprehensive
to embrace artificial as well as natural persons. The
mischief intended to be remedied applies as well to
debts due by them, as by individuals; and the circum-
stances in which they are placed are the same as those
of others embraced in the statute.

I think a fair construction of the statute authorizes

the proceeding against the corporation in a proper case; and no objection being urged to the proceeding here, except the general one, that a corporation could not be summoned as a garnishee on such an attachment, the motion to discharge the attachment was properly overruled.

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I think, however, the verdict is defective in not responding to the issue really raised upon the answer of the garnishee. That answer, taking it all together, must, it seems to me, be construed as referring to the time of the service of the attachment. It declares in express terms, that there was no other money at the time of the service of said attachment, subject to the plaintiff's attachment, only as above stated. Some confusion has arisen out of the provisions in the statute referring to proceedings in law and at equity under the 2d and under the 11th sections. An attachment under the 2d section may be served, by the provisions of the 7th section, on such person as may be in possession of effects of, or *indebted* to, the defendant. By the 9th section, the officer is to return with the attachment, the names of the persons having effects of or *owing debts* to the defendant. And the 12th section gives the plaintiff a lien from the time of service, upon the personal property, choses in action and other securities of the defendant in the hands of, or *due* from, the garnishee on whom it is served.

All these provisions seem to look to the time of the service of the attachment, as the period at which there should be an existing debt from the garnishee to the defendant, whether then actually payable or to be paid at a future day, it is not necessary now to enquire.

The 11th section regulating attachments in equity, authorizes the attachment upon debts due or *to become due* to the defendant by the other defendants. As the lien given by the 12th section extends to both classes of attachment, possibly the phrase *debts to become due*,

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may be satisfied by limiting the expression to debts then existing, payable at a future day. This construction would render the provision of the 11th section consistent with the 12th section giving the lien. The 17th section applies to both courts, and provides, if on such examination (referring to the examination of the garnishee on oath when the proceeding is under the 2d section at law,) or by his answer to a bill in equity, it appear that *at or after* the service of the attachment he was indebted to the defendant, &c.

Unless the attachment at law is to be extended so as to embrace existing debts payable in future, and the attachment in equity restricted to debts of the same character, there would be some difficulty in applying these general words to both classes of attachments, and it might be necessary to read them distributively, making the attachment at law apply to debts owing *at* the service, and in equity *at or after* the service of the attachment. However this may be, as the answer of the garnishee referred to the time of the service of the attachment the verdict finding that the company was indebted on the 18th of May 1852, and afterwards, is no reply to the answer. The answer or examination may have been true, and contained a full disclosure, and yet be consistent with the verdict. There may have been no other debt on the 14th January 1852, the time of service, and so nothing for the attachment to operate upon; but between that and the 18th of May 1852 and afterwards there may have been new contracts out of which new claims may have arisen. I think the verdict was too defective to enable the court to pronounce any judgment thereon.

I am also of opinion that the court erred in permitting evidence of the statements of James L. Randolph, the division engineer, made to the witness A. F. Haymond, to be given in evidence to the jury. There is nothing in the facts certified in the bill of exceptions,

showing that Randolph was acting within the scope of his authority in making such admissions. The conversation was with a third person not in the presence of the defendants, the said Crowleys; and the agent was not engaged in any transaction with the alleged creditors of the company, rendering it necessary to advert to the state of accounts between them; so that the declarations cannot be treated as part of the *res gestae*, determining the quality of the acts which they accompanied. They amount to no more than statements in reference to a state of accounts, growing out of past transactions, without its being shown that he ever was the agent to settle such accounts, and determine the state of indebtedness on the part of the company to these contractors; or that he knew how much had been paid to them by the company; or that at that time he was the agent to settle with and pay them. His statements were nothing more than a declaration made in relation to business, concerning a portion of which he was employed as agent; and during the course of such employment acquired a knowledge of the monthly estimates of work done. These declarations do not amount to proof against the company. The fact should have been proved by the agent. The bill of exceptions shows he was examined and declared he did not know how much money had been paid to the Crowleys at that time. I think there was no error in overruling the motion to discharge the attachment upon the ground that the company was not liable to be proceeded against as garnishee. But that there was error in proceeding to render judgment on the verdict of the jury, the same being defective; and in permitting the statements of the said J. L. Randolph to the witness, as set forth in the bill of exceptions, to be given in evidence to the jury: And I am therefore for reversing and remanding for a new trial, with instructions to exclude the evidence of the

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statements of said J. L. Randolph, if again offered under the same state of facts disclosed in said bill of exceptions.

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adm'r's. The other judges concurred in the opinion of ALLEN, P.

The judgment was as follows :

It seems to the court here, that the plaintiff in error is liable to be sued in the courts of this commonwealth; and that it could be proceeded against as a garnishee under the second section of the Code, ch. 151, p. 601. It is therefore considered by the court, that the Circuit court properly overruled the motion of the plaintiff in error to discharge it from answering to said summons as garnishee.

It further seems to the court here, that the issue made up by the answer of the plaintiff in error and the suggestion of the defendant in error that the said garnishee had not fully disclosed the debts due by it to, or effects in its hands of, the defendant, referred to the time of the service of the attachment on the garnishee; and the verdict should have responded thereto, but entirely fails to do so. Instead of ascertaining whether there were any such debts or effects due by or in the hands of the garnishee at the time of such service, it is found by the jury that the plaintiff in error has not fully disclosed the debts due by it to, or effects in its hands of, said Crowleys; and that there was a sufficient amount due to them by the plaintiffs in error on the 18th of May 1852, and also afterwards, to satisfy the plaintiff's judgment. This verdict may consist with the answer: There may have been no more due at the time of service than the amount disclosed by the answer; and yet other debts may have been created under contracts entered into after the service of said attachment. To sanction such a find-

ing would be unjust to the garnishee; for although he may show he has made a full disclosure of the debts due by him to, or effects in his hands of, the defendant at the time of such service, he may be surprised by evidence of transactions which occurred after such service. It seems, therefore, to this court, that said verdict was defective, and should have been set aside, and a new trial awarded.

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And it further seems to the court here, that upon the facts set forth in the bill of exceptions taken by the plaintiff in error, that the court erred in permitting the declarations of James L. Randolph, made to the witness A. F. Haymond, and set out in the bill of exceptions, to be given in evidence to the jury; it not appearing that said Randolph was the agent of the plaintiff in error having any authority over this subject, or that at the time of making the declaration he was engaged as agent about the business referred to, so as to make his declarations part of the transaction, explaining the nature thereof.

It is therefore considered by the court, that said judgment is erroneous. It is therefore reversed with costs, the verdict set aside, and the cause remanded, with instructions to impanel another jury to enquire as to the debts due by the plaintiff in error to, or effects in its hands of, the said Crowleys at the time of the service of the attachment; and upon such enquiry and trial the declarations of the said Randolph, as set out in the bill of exceptions, if again offered in connection with the facts disclosed in the bill of exceptions, and no other proof, are not to be permitted to go in evidence to the jury if again objected to by the plaintiff in error.

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1. An ancient deed may be introduced as evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine.
2. A *caveat* is revived in the name of the executor of the caveator, who is directed to sell the land, and the devisees of the proceeds of sale; and no objection is taken thereto until after the verdict. The executor being the proper party, the irregularity of joining the others with him will then be disregarded.

This was a *caveat* in the Circuit court of Marion county, filed in January 1849, by William Eldridge, to prevent the issue of a patent to William Caruthers and David Morgan for seven hundred and ninety acres of land, of which they had made an entry, and had a survey made. After the proceeding had been commenced the caveator died, and it was revived in the name of his executor and the devisees of the proceeds of the land which was directed by the will to be sold.

On the trial the caveators introduced a patent bearing date the 6th of November 1797, to Daniel Eldridge, for one thousand acres of land in the county of Monongalia. They also offered in evidence a deed from Daniel Eldridge and wife to William Eldridge, both of the city of Philadelphia, bearing date the 7th day of August 1815, for the one thousand acres of land embraced in the patent to Daniel Eldridge. To this deed there was a certificate under seal of the same date with the deed, by which William Tilghman, describing himself as chief justice of the Supreme court of Pennsylvania, certified the acknowledgment

of the deed by Daniel Eldridge and the privy examination of his wife; and there was a certificate of the clerk that upon this certificate the deed had been admitted to record in the clerk's office of Monongalia County court on the 21st of August 1815. The execution of this deed was not proved, but it was proved that from the date of the patent until 1815, inclusive, the land had been charged on the commissioner's books of Monongalia county to Daniel Eldridge; that from 1816, inclusive, to 1846, it was charged on said books to William Eldridge; that in 1847 to 1851, both inclusive, it was charged on the commissioner's books of Marion county to said William Eldridge. That though the land was returned delinquent for taxes for the years 1799 to 1810, and for 1812, 1813 and 1818, these taxes had all been paid into the auditor's office, except for the last named year; and they had been released.

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It was further proved that Daniel Eldridge had, prior to 1815, visited the land, claiming it under his patent; but that since the day on which the deed purports to bear date, he had not visited it, or set up any claim to it, so far as was known to a witness who lived near the land, and who before 1815 had acted as his agent.

It was further proved, that about the year 1815 William Eldridge, who then lived in Philadelphia, came to the county of Monongalia, and had the land entered on the commissioner's books in his name, and charged with taxes; and went upon and claimed it as his own under a purchase from Daniel Eldridge; and appointed an agent living in the neighborhood to look after the land and make leases thereof. That he in 1815 leased a part of it to Patrick Murphy for seven years, and put him in possession, with liberty to clear as much of the land as he might see proper, and to hold the same for seven years as a compensation for clear-

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ing and fencing the same; which were the customary terms of the country at that time. This contract was by parol, and under it Murphy cleared some ten acres, and erected a cabin thereon, in which he lived; that after the seven years expired, it was left unoccupied, and grew up in woods again. That the agent of Eldridge rented another portion of the land to one Terrell for seven years, who entered upon and occupied it for about four years, when he sold his lease to a third person, and left the land. That prior to 1838, Thomas P. Ray, who was the clerk of the county of Monongalia, had been the agent of William Eldridge, for said land, and had possession of his title papers, including the said deed, and in that year surrendered his agency with the papers and some money put into his hands by Eldridge to pay the taxes, to James Evans, another agent appointed by Eldridge.

It was further proved, that in the year 1838 Hezekiah Moran was in possession of part of the land, holding and claiming the same under a patent to Joshua Knight, under whom Moran then claimed; and that in the year 1838, Moran being so possessed, rented of William Eldridge the land then held by him, stipulating to pay rent therefor; and that he has ever since continued to hold the same as tenant of Eldridge. And that in 1838 Eldridge rented another part of said land to Amos Browner, who has continued to hold as his tenant. And a witness stated that he had seen the deed from Daniel to William Eldridge recorded in the clerk's office of Monongalia county in one of the old deed books, corresponding, as he supposed, in age and date with the date of the certificate of the clerk endorsed on said deed; and had copied the courses and description from it.

It was further proved that William Eldridge continued to reside in Pennsylvania until about the year when he removed to the county of Marion, in

which said land was then situate, and settled upon a portion of it, claiming the entire tract as his own; and continued to reside upon it until his death.

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The foregoing being all the evidence offered by the caveators to render said deed admissible in evidence, and not proving the same in any other manner, but it appearing fair upon its face and free from alteration and change, the caveatees objected to its introduction; but the court overruled the objection, and admitted the deed; and the caveatees excepted.

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The caveators then introduced the will of William Eldridge, by which he directed his executor to sell all his lands, and after the payment of his debts, he gave the proceeds thereof, and all the rest of his estate, to be divided among certain persons who were, with the executor, the parties in this case; and he authorized his executor to convey his lands.

After the jury had rendered their verdict, the caveatees moved the court to set it aside and dismiss the *caveat*, on the ground that improper parties were before the court: But the court overruled the motion; and rendered a judgment for the caveators, that no grant should issue for the caveatees in pursuance of their survey. The caveatees thereupon applied to this court for a *supersedeas*, which was allowed.

Haymond, for the appellants.

Fry, for the appellees.

DANIEL, J. The paper dated the 7th day of August 1815, purporting to be a deed from Daniel Eldridge to William Eldridge, was not legally recorded. There was no law in force at the era of its date, which allowed of its being recorded on the force of an acknowledgment before the chief justice of the Supreme court of Pennsylvania. And it is, I think, obvious from the statement of the judge of the Circuit court

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in the bill of exceptions, that the ground on which he permitted said paper to go to the jury as evidence of a conveyance, was that of its being an ancient deed. The counsel for the caveatees insists that this ground for the action of the court is not tenable, and that the judge has misconceived the rule of law regulating the admission of ancient deeds without proof of execution. And he contends that in no case can proof of the execution be properly dispensed with, until it is first shown that thirty years' quiet and continued possession of the land has been held under the deed. And in support of his view of the law, he cites Gilbert's Evidence, p. 89; Coke Litt. 6 b; 2 Bacon Abr. Evidence 648; 2 W. Black. R. 1228; 3 John. R. 292; 6 Binn. R. 439; 9 John. R. 169; 1 Har. & John. 174; *Dishazer v. Maitland*, 12 Leigh 524.

The question is one on which there is some conflict of decision, rendering it necessary in my opinion, in order to arrive at a correct conclusion as to the state of the law on the subject, to review the opposing authorities. In the performance of the task I shall examine briefly each of the authorities relied on by the counsel of the caveatees.

Gilbert in his "Law of Evidence," after stating generally the rules essential to the admission of deeds, at p. 88, 89, says, "But to this rule there are several exceptions. First. If the deed be *forty* years old, that deed may be given in evidence without any proof of the execution of it; for the witnesses cannot be supposed to live above forty years; and forty years is proof sufficient of a presumption; for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient to understand the nature of right and wrong, and the general forms of contracting; so that after forty years the witness must be supposed to be dead; and since no person living can be supposed to be coeval with

such deeds, therefore they may be offered in evidence without proof. But he (he proceeds) it *had* been ruled that if a deed be forty years old and possession hath not gone along with the deed, they ought to give some account of the deed; because the presumption fails that was established in behalf of such deeds, where there is no possession; for it is no more than old parchment if they give no account of its execution." The last paragraph, which is no doubt the one relied on as showing that, according to Gilbert, it is necessary there should be continual possession for thirty years, does not in terms assert such a proposition; and is not, I think, susceptible of such a construction. It says, it is true, it *had* been ruled that possession should go along with the deed; but I do not understand him as saying that the ruling of the court to which he refers, requires that it should have continued for the forty years. Again, at the commencement of the same chapter, p. 83, after saying that the deed must be regularly proved by one witness at least, he says, "This is now to be understood when the deed is of a late date, for if the deed be of thirty years' standing, which now makes an ancient deed, and the person to whom the deed was made, or those deriving under him, have been in possession under the deed, such ancient deed shall be read without proof, though the witness to it be alive; and this Baron Gilbert declared to be the rule of evidence at *nisi prius*; and if the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the ancient deed unless the contrary be proved."

The passage in Coke, relied upon by the counsel of the caveatees, is as follows: "And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz: violent, probable, and light or temerary. *Violenta presumptio*

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is many times *plena probatio*: as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men,) then violent presumption, which stands for proof, is continual and quiet possession." It will be seen that Coke is here treating of presumptions, and he cites the presumption founded on possession under an ancient deed as an instance of the *violentia presumptio* or full proof, as he does that also founded on a man's being seen to come from a house in which murder has been committed, with a drawn sword in his hand. He is not engaged in the task of pointing out all the cases in which a deed may be presumed to be genuine without proof of its execution; and it seems to me that it would be just as fair to conclude from this passage that he intended to give the only instance in which a murder might be presumed from circumstances, as that he intended to say that quiet and continual possession furnished the only evidence from which to infer the genuineness of an ancient deed.

In Bacon's Abridgement, Evidence, H, 7th edition, p. 318, (where I suppose is to be found the authority to which the counsel of the caveatees refers,) the only passage having immediate bearing on the rule under consideration is, "In case of a feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for *any length* of time, will make a strong or violent presumption which stands for proof." It is very obvious that this citation does not sustain the proposition that there must be possession under the deed for thirty years.

The case of *Earl v. Baxter*, cited from 2 W. Black.

R. 1228, is very short and I quote it entire. "Ejectment at last Norwich assizes for the residue of a term of one thousand years granted the 5 Eliz. The lessor of the plaintiff produced the original lease and proved possession in himself, and those under whom he claimed, ever since the 6th Anne, and also showed one mesne assignment in 16 Jac. 1. Sergeant Foster, who tried the case, then thought it incumbent on the plaintiff to prove all the mesne assignments; for want of which, the plaintiff was nonsuited; but he since changed his opinion, and so reported it to the court. The court was clear that the sergeant's opinion was right, and that it should have been left to the jury, with a recommendation to presume all the mesne assignments: And in consequence nonsuit set aside without costs." There is nothing here to infer what would have been the fate of the case had there been a failure of proof as to the long continued possession which was shown in the lessor of the plaintiff, and those under whom he claimed.

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It must be conceded that in the case of *Jackson v. Blanshan*, 3 John. R. 292, there was a direct ruling in favor of the proposition contended for by the counsel of the caveatees. In that case possession was proved under the will of a testator from the time of his death, which had occurred some twenty-six or twenty-seven years before the trial; and though the will bore date more than thirty years back, it was held that some proof of its execution was necessary; it being proved that one of the three subscribing witnesses was yet alive. Kent, chief justice, in delivering his opinion, said, "It is not proper to compute the will from its date, but only from the time that possession took place under it. It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed." And he proceeded to argue that when the possession fails, the presumption must fail

1855. also; that the length of the date would not help the deed, for if that were sufficient, a knave would have nothing to do but to forge an ancient deed. And he concluded that as the death of the testator had occurred only twenty-six or twenty-seven years before the commencement of the suit, the will in that case ought not to be read as evidence, inasmuch as the time of possession under it fell short of the lowest period which, according to his view of the authorities, had been required to establish an ancient deed. The opinion of this learned judge on any question of law is entitled to much respect; but it is to be observed that the decision in the case never had any force as authority even in New York, inasmuch as it was made by only two judges, a minority of the court. Van Ness, J. concurred with Kent, Ch. J.; Spencer dissented, and Thompson and Yates did not hear the argument in the cause, and gave no opinion.

Of the case from 9 John R. 169, *Doe v. Phelps*, it is not necessary to say more than that it affirms a well settled doctrine, about which no question has been made here. In that case possession had been enjoyed for more than fifty years under a deed which purported to be made in pursuance of a power of attorney. The court said that an ancient deed, with possession corresponding with it, proved itself; and that a power of attorney, contained in such deed and necessary to give it validity and effect, ought equally to be embraced by the presumption. No intimation of opinion was given by the court that in the absence of such corresponding possession other circumstantial proofs might not be received, on which to predicate the presumption.

The like remark will justly apply to the case from 6 Binn. R. 439. The possession had been enjoyed under a will for more than thirty years, and the case did not necessarily call for any thing more than the application to an ancient will of the rule which had been

announced, in the case just above cited, in respect to the ancient deeds. Tilghman, Ch. J. however, in delivering his opinion, took occasion to approve the doctrine held by Kent, Ch. J. in *Jackson v. Blanshan*, 3 John. R. 292, and said, that "although the antiquity of the writing affords some evidence in its favor, yet the *main ingredient is possession*. Both however are necessary to raise that presumption which will justify the court in departing from the usual rule which requires the production of the subscribing witnesses, or proof of their handwriting, after accounting for their absence." This opinion may be perhaps fairly regarded as one in favor of the doctrine contended for; but I do not regard the *authority of the case* as going further than to affirm that where there has been more than thirty years' possession under a paper set up as an ancient will, the genuineness of the paper may be presumed.

The case of *Carroll v. Norwood*, 1 Har. 8 John. 167, 174, may I think be fairly considered as deciding that an ancient deed is not evidence without proof of the execution, unless it is found that the possession has gone and been held according to the deed.

The last of the cases cited by the counsel of the caveatees are those of *Deshazer v. Maitland*, and *Same v. Same*, 12 Leigh 524.

In the first case, which was an action of *quare clausum fregit*, a paper purporting to convey the land in question, was dated the 1st of September 1789. It appeared that it had been proved by one of four subscribing witnesses in the county court of Charlotte, in December after its date, and continued for further proof; and that it was found in a bundle of proved deeds in the clerk's office. Maitland proved that he had paid the taxes on the land from 1790 to 1815, both inclusive, and again from 1816 to 1827, both inclusive; but no proof was offered that Maitland or the

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grantees in the deed under whom he claimed, had ever been in actual possession under the deed.

In the second case, which was an action of ejectment, the proofs in respect to the deed were very much the same, with the addition that Maitland, the plaintiff in the action below, proved that he had made diligent enquiry after the subscribing witnesses, and could get no account of them, except that they had all died many years ago, and that he could find no one acquainted with their handwriting. It further appeared that neither Downman the grantor, nor any one claiming under him ever set up any claim to the land in opposition to the deed; but it also appeared that no one lived on or was in actual possession of, the land until the defendant in the action Deshazer, took possession thereof some four or five years before the commencement of the suit.

The Circuit court admitted the evidence in each case, and this court reversed both judgments, holding that the deed had been improperly permitted to go to the jury. Judge ALLEN, in delivering his opinion, which was concurred in by the other judges, relied mainly on the passages from Coke, Bacon and Gilbert, and the cases from 3 Johnson and 6 Binney, already referred to.

I will now proceed to examine briefly some of the authorities maintaining the opposite doctrine.

In the case of *The King v. Inhab. of Farringdon*, 2 T. R. 466, it was held that an allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate and signed by two justices, was alone sufficient proof of the certificate where such certificate was thirty years old; notwithstanding the certificate did not certify the affidavit of one of the witnesses to the due execution and attestation of the certificate according to the 3 George 2, c. 29. The certificate had been acted on for more

than thirty years. Ashhurst, Judge, said, "The certificate having been granted above thirty years, it is not necessary to substantiate it by the mode of proof prescribed by the act; for it having been recognized and acted under for so long a period, it was not necessary to have recourse to the act at all. Therefore, on the ground of the length of time which has elapsed since the certificate was granted, I think it is binding." Buller and Gross, Js. however, made no reference to the fact that the certificate had been acted upon, but expressed the opinion, without any such qualification, that the certificate might be read under "the established rule which holds in the case of every deed, that if it be above thirty years' standing, it proves itself."

In the case of *The King v. Inhab. of Ryton*, 5 T. R. 259, the same doctrine was held in respect to a certificate, more than thirty years old.

So in the case of *Oldham v. Wolley*, 15 Eng. C. L. R. 150, a will more than thirty years old was allowed to be read in evidence, *although the testator had died within thirty years*, and some of the subscribing witnesses were proved to be still living. And in *Doe v. Passingham*, 12 Eng. C. L. R. 209, a will more than thirty years old was received without any proof of possession under it. See also Lord Eldon's opinion in the matter of *Sir T. Parkyns' will*, 6 Dow 202, and 12 Viner's Abr. 84, Evidence.

In 7 Comyn's Dig. 429, *Testmoigne*, b. 2, it is said that "an ancient deed dated forty years past, shall be read without further proof." So Roscoe, in his Treatise on Evidence, 14, Presumptive Evidence, announces the doctrine "that a deed thirty years old or upwards is presumed to have been duly executed, provided some account be given of the deed, where found," &c.

Best also in his Treatise on Presumptions, 47 Law Lib. 65, lays it down as an established rule, "that

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deeds, wills and other attested documents, which are more than thirty years old, and are produced from an unsuspected repository, prove themselves, and the testimony of the subscribing witnesses may be dispensed with; although it is of course competent to the opposite party to call them to disprove the regularity of their execution."

Philips, in stating the exceptions to the general rule in respect to the Proof of Writings, vol. 2, p. 203, says, "It is a rule that if an instrument is thirty years old, it may be admitted in evidence without any proof of its execution; such instrument is said to prove itself. The danger arising from such a relaxation of general principles is, in some measure, diminished by the operation of the rule which requires documents to be produced from their proper place of custody; and in many instances the circumstances of the instruments having been acted upon, and of the enjoyment of property being consistent with and referable to it or otherwise, affords a criterion of its genuineness. The exception applies generally to deeds concerning lands, &c. and all other ancient writings; and the execution or writing of them need not to be proved, provided they have been so acted upon, or brought from such a place as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion or dishonesty."

In Mathews on Presumptive Evidence 270, the rule is stated in the same way. "The general probability of the due execution of instruments which were meant to have a legal operation, is by many degrees increased by lapse of time; which, as it affords opportunity to those whose interest it was to dispute their efficiency, shows at once the acquiescence of such persons, and also a conviction on their part that all proper steps were taken to render the assurances in question valid. On this principle, supported by a consideration of the

difficulty if not the impossibility of obtaining living testimony, deeds of thirty years' standing, by a very ancient rule of law, are admitted in evidence without proof of their execution; and when the witnesses are dead, deeds of *even a less age*, provided the enjoyment of the property to which they relate has corresponded with the limitations, are received as genuine and authentic."

Starkie, in vol. 1, p. 65, says, "Presumptions are frequently founded upon, or at least confirmed by, ancient deeds, muniments found in their proper, legitimate repositories, although, from lapse of time, no direct evidence can be given of their execution, or of their having been acted upon. It seems, however, that in order to the reception of such evidence, or at least to warrant a court in giving any weight to it, a foundation should be first laid for its admission, by proof of acts, possession or enjoyment, of which the document may be considered explanatory. So it has been said that in the case of a charter of feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for *any length of time* will make a strong or violent presumption, which stands for proof."

This review of English authorities, whilst it does not clearly show the establishment of a precise and well ascertained rule on the subject, does, I think, serve to show that the weight of authority in England is opposed to the doctrine that thirty years' quiet and continual possession under an ancient deed is indispensable to the presumption of its genuineness. And I think that the weight of authority in this country is the same way.

In the case of *Jackson v. Laraway*, 3 John. Cas. 283, a will executed in 1723, and which had been proved by the witnesses in 1733 and 1744, and recorded, but not in a manner authorized by law, was allowed to be read in evidence on the trial of an action of ejectment in 1801, on the footing of an ancient

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deed; though actual possession did not follow and accompany the will.

Radcliff, J. in delivering his opinion, after adverting to the fact that the premises in dispute were in a wild and uncultivated state, and for a long time actually in the possession of no one, said, "The general rule on this subject I take to be, that a deed appearing to be of the age of thirty years, may be given in evidence without proof of its execution, if the possession be shown to have accompanied it, or where no possession has accompanied it, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine. This rule is founded on the necessity of admitting other proof as a substitute for the production of witnesses who cannot be supposed any longer to exist. A correspondent possession is always high evidence in support of such a deed; but when no such possession appears, other circumstances are admitted to account for it and raise a legal presumption in its favor." Kent, J. dissented, in an opinion holding very much the same views afterwards expressed by him in the case of *Barham v. Blanhan*, 3 John. R. before referred to. A majority of the court, however, concurred in opinion with Radcliff, J.

In *Jackson v. Lopuere*, 5 Cow. R. 221, Woodworth, in delivering the opinion of the whole court, whilst he said that he did not think that mere efflux of time was sufficient to admit a will to be read without proof, expressed a full concurrence in the rule laid down in *Jackson v. Lopuere*, and said that the law of that case had never been overruled, and ought to govern in the one then under consideration.

And again, in *Hacker v. Cork*, 7 Wend. R. 371, a lease more than thirty years old was received in evidence without proof of its execution. It was found among the title papers of the estate affected by it, and the facts and circumstances in reference to the

property specified in it, were such as, in the opinion of the court, afforded sufficient presumption of its genuineness, although there was no direct proof of possession accompanying it. Nelson, J. who delivered the opinion of the whole court, said, "There was some confusion and contradiction in the cases in England and in New York as to the preliminary proof necessary to authorize an ancient deed to be read in evidence. Possession (he said) accompanying the deed was always sufficient without other proof, but it was not indispensable. He approved the decision in *Jackson v. Larroway*, which, he said, had been recognized as law in *Jackson v. Laquere*, and had undoubtedly in its favor the weight of English authority."

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It must be conceded, however, that by recent decisions of the Supreme court of New York, the law on the subject is there left in a very unsettled state. See *Troup v. Hurlbut*, 10 Barb. R. 354; and *Ridgeley v. Johnson*, 11 Barb. R. 528.

The doctrine of *Jackson v. Larroway*, is fully recognized by the Supreme court of the United States in the case of *Barr v. Gratz*, 4 Wheat. R. 213; and by the Court of appeals of South Carolina in the case of *Robinson v. Craig*, 1 Hill's S. C. R. 389. The subject is very fully examined by Greenleaf, in his Law of Evidence. In the 21st section of the work, speaking of ancient deeds and wills, he says, "when these instruments are more than thirty years old, and are unblemished by any alteration, they are said to prove themselves; the bare production thereof is sufficient, the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living. But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from just grounds of suspicion. Whether, if the deed be a conveyance of real estate, the

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party is bound to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the negative. See again his views in section 144, and in a note thereto, in which he collates the cases on the subject, and comes to the conclusion that the weight of authority is clearly against the doctrine that the absence of proof of possession may not be supplied by other satisfactory corroborative evidence, and says that it is now agreed that where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances.

And, in *Coren & Hill's* notes to Philips, vol. 4, p. 396, there is a very able and elaborate review of the decisions, from which is deduced the result that a deed thirty years old or upwards, purporting to be a conveyance of property, real or personal, is sufficiently corroborated to be read without further assurance of authenticity, by showing that possession of the thing it assumes to convey has gone along and been held in accordance with its provisions: That when the length of possession is the circumstance *solely* relied on, the weight of authority favors thirty years as the shortest period: But that this doctrine with respect to the length of possession is to be understood with the qualification that possession is the *only* circumstance relied on by way of showing the authenticity of the instrument. And that a full corresponding possession is not the *only* corroboration which will allow the instrument to be read without proof of its execution.

Upon the best examination I have been able to make of the subject, I have come to the conclusion that the authorities do not furnish satisfactory evidence of the existence here or in England of any well established rule, which, in the absence of proof of execution, makes a continual possession for thirty years, under an ancient deed, the sole sufficient test of its authenticity. And when I look to the foundations on which the rule

is supposed to rest, I must confess my inability to discover that solid and substantial reasoning on which it might be expected that a rule, of such vast importance in its consequences, would be placed.

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On the other hand, a rule which would allow the paper to prove itself, or which, in other words, would declare the antiquity of its date alone a sufficient proof of its genuineness, is justly obnoxious to the objection of Judge Kent, that "then a knave would have nothing to do but to forge a deed with a very ancient date." Such objection is, however, wholly without weight when urged against the adoption of the general rule announced in *Jackson v. Laraway*.

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When the deed is of recent date, the party who offers it in evidence is required to produce the witnesses to its execution, if any, or proof of their handwriting, in case they are dead; and if there be no subscribing witnesses, he must prove the handwriting of the maker. But when the deed is of an ancient date, the production of such proof is no longer in the power, or is supposed to be no longer in the power, of the party. A resort to presumptive proof is then allowed. What is there in the nature of the enquiry which renders it proper to declare that a corresponding possession shall be the only sufficient evidence of the fact to be presumed, viz: the genuineness of the deed? A presumption may be the result of a single circumstance or of many circumstances. Why say that, in the case of an ancient deed, there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from the single circumstance of possession, but may not be presumed from other circumstances, the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument? The direct evidences, the positive proofs by which the execution of the deed is established, being no longer attainable, and the rule, which requires their produc-

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tion, being dispensed with, it seems to me wholly at war with the spirit of the law, which, under such exigency, allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed. Such possession does indeed furnish a violent presumption, but if in its absence there are other evidences (not intrinsically objectionable) equally capable of producing the same degree of belief, I canot see the good to be obtained, or the evil to be avoided, by rejecting them.

I deem it unnecessary to comment on the facts produced before the court as the groundwork for the introduction of the deed. A reference to the statement of the case will suffice to show that they were such as to exclude all doubt of the authenticity of the deed. And I think the court did right in permitting it to go to the jury.

The second cause of error assigned cannot be sustained.

In *Archer, adm'x, v. Saddler*, 2 Hen. & Munf. 370, this court held that an administrator with the will annexed being in possession of lands therein directed to be sold, might maintain a *caveat* to prevent any other person from obtaining a patent for the same, as waste and unappropriated. Allen, the executor of Eldridge, was then a proper party; and the proceeding being one in the nature of an injunction, I do not think that the irregularity (if any there was) in permitting the suit to be revived and proceeded in in the names of the executor and the devisees, can avail now to defeat the proceedings, especially as no objection in respect to parties was made till after verdict.

MONCURE, LEE and SAMUELS, Js. concurred.

ALLEN, P. dissented.

JUDGMENT AFFIRMED.

Richmond.**DILWORTH v. THE COMMONWEALTH.**1855.
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1. On a trial for a felony a member of the grand jury which found the indictment against the prisoner, is not a competent juror to try him.
2. If the prisoner does not know, or might not with due diligence have known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objection to the juror, if made before any of the evidence is introduced.
3. QUÆRE: If he may not make the objection at any time before the verdict is rendered? And it seems he may.
4. QUÆRE: If upon such objection being made to a juror, it is proper to examine him upon his *voir dire* as to the circumstances, and the state of his mind and feelings towards the prisoner?
5. The act, Code, ch. 162, § 4, p. 628, only relates to those disabilities created by our statutes; and does not refer to other causes of challenge which exist at common law, and as to which the statutes are silent.

John Dilworth was indicted in the Circuit court of Harrison county, for the murder of Addison Bumbgardner. When the trial came on, William Flanagan was called as a juror, and was sworn and tried on his *voir dire*; and stated that he had not made up or expressed any opinion as to the guilt or innocence of the prisoner, and proved himself free from exceptions; and was thereupon placed upon the panel of twenty-four. The first day was consumed in obtaining a jury, and directly it was impaneled and sworn, and before any testimony was introduced, the court adjourned until the next day.

On the next day, before any testimony was introduced, the prisoner filed his own affidavit and also the

1855. affidavit of John R. Dawson, the jailor, and moved
January Term. the court to discharge William Flanagan, one of the
jurors, and substitute another in his stead.

Dilworth v. The Commonwealth. The prisoner in his affidavit, stated that after the jury had been impaneled and sworn and the court had adjourned, he was informed that Flanagan, one of the jurors, had been one of the grand jury which found the indictment upon which the prisoner was then about to be tried. That when Flanagan was impaneled and sworn, the prisoner did not know that he had been a member of the grand jury, or he would have struck his name from the panel. The jailor stated that he had informed the prisoner of the fact that Flanagan had been a member of the grand jury that found the indictment against him, after the adjournment of the court on the previous evening. The court thereupon caused Flanagan to be sworn. He stated that he was a member of the grand jury which found the indictment against the prisoner. That they heard the evidence of one witness, and part of the evidence of another; that then the foreman announced that he had heard the evidence in the case before, and that it was not necessary to hear further testimony; and thereupon the indictment was found, the said Flanagan among others, voting for it.

He further stated that he paid very little attention to the testimony, and did not then and had not since formed any opinion of the prisoner's guilt or innocence; and that he had no prejudice or bias for or against the prisoner; that he was wholly indifferent, and had no doubt that he could give the prisoner a fair and impartial trial according to the law and the evidence; that he was governed by what the jurors said as well as what was testified to by the witnesses; that the grand jury had a press of business on hand, and was anxious to dispose of it. And he stated that he had told Dawson that he did not suppose he could be summoned as he was on the grand jury.

When the juror had been examined, the court en-
quired of the prisoner's counsel how the place of said Flanagan should be supplied, or if he was discharged from the jury, what should or could be done; to which the prisoner's counsel remarked that the commonwealth had had a grand jury, and now had her petit jury, and must remove the difficulty. The court thereupon overruled the motion. And the prisoner excepted.

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The jury found the prisoner guilty of murder in the second degree; and fixed the term of his imprisonment in the penitentiary at eight years. And he thereupon filed a plea in arrest of the judgment, on the ground that Flanagan, who was one of the jurors who rendered the verdict, had been one of the grand jury which found the indictment a true bill. The court overruled the plea; and also overruled a motion by the prisoner for a new trial, made on the same ground: And the prisoner again excepted; and applied to this court for a writ of error, which was awarded.

The case was argued by *Patton*, for the prisoner, and the *Attorney General*, for the commonwealth. The propositions and authorities relied upon by them, are referred to in the opinion of Judge DANIEL.

DANIEL, J. It is well settled that it is a principal cause of challenge to one called as a juror on a trial for felony, that he was of the grand jury who found the indictment against the prisoner. 21 Vin. Abr. Trial, 258; Coke Lit. 156 b; *Herndon v. Bradshaw*, 4 Bibb's R. 45; *Barlow v. The State*, 2 Black. R. 114; *Hunter v. Matthews*, 12 Leigh 228.

The juror Flanagan is in that predicament; and it is urged on behalf of the prisoner, that sentence has been pronounced against him without his ever having

1855. enjoyed the right to a trial by a jury free from exception; whilst on behalf of the prosecution it is argued, January Term.
— that the prisoner has not only waived his right of challenge, but that his exception to the juror has also been Dilworth v. The Commonwealth. in fact satisfactorily answered; and that he has no good reason for arraigning the justice of the sentence by which he stands condemned.

The 4th section of ch. 162 of the Code of 1849 provides that no exception shall be allowed against any juror after he is sworn upon the jury, on account of his estate, age or other legal disability. It was, however, conceded in the argument, that this section is designed for the regulation of exceptions founded on the disabilities created by our statutes only; and has no reference to other causes of challenge which exist at common law, but as to which the statutes are silent.

The latter, it is admitted, are still governed by the principles and rules of practice of the common law.

It is insisted, however, by the attorney general, that these principles and rules require all challenges for whatever cause, to be made before the jurors are sworn; and that nothing occurred on the trial of this case of which the prisoner can now be heard to complain: and in support of his position, he has cited Hawkins' Pleas of the Crown; Archbold's Criminal Practice; the cases of *State v. Quarrell*, and *State v. O'Driscoll*, 2 Bay's R. 151, 153; *Barlow v. The State*, 2 Black. R. 114; and also the cases of *Jones, Heth, Curran*, and others of a like character, decided by our General court.

Hawkins and Archbold, and other text writers on criminal law, do state it as a general rule, that no juror can be challenged, by either side, without consent, after he has been sworn, unless it be for some cause which happened since he was sworn; and I believe the practice which most usually prevails is to require the challenges to be made as the jurors come

to the book, to be sworn in chief. And such was the practice previous to the revision of the criminal laws in 1848.

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It is true that in the first of these cases (*State v. Quarrell*,) a motion to set aside a verdict on the ground that one of the jurors was an alien, was denied; and that in the cases of *State v. O'Driscoll* and *Barlow v. The State*, like motions founded on the fact that some of the petit jurors were on the grand juries that found the bills, met with a similar fate. The same decision was made in the case of *Gillespie and others v. The State*, 8 Yerg. R. 507; and a like decision was also made in a case of an analogous character by the Supreme court of Connecticut. *Quinebaug Bank v. Leavens*, 2 Conn. R. 87.

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In the two first cited cases it does not appear that there was any affidavit even by the prisoners to show that they were ignorant of the causes of challenge to the jurors, at the time they were sworn; and in the absence of such evidence, the court, I think, very properly held that the prisoners had waived their privilege.

In the case of *Gillespie and others v. The State*, there was an affidavit of the prisoner of his want of knowledge; but I infer, from some remarks of the judge who delivered the opinion of the court, that it was not supported by other evidence, and that little or no credit was given to it. And in the case of *Barlow v. The State*, the evidence, instead of showing that the prisoner was ignorant of the fact that two of the jurors had been on the grand jury who found the bill, proved that he had previously known it. The court said, "The defendant does not deny the previous knowledge, but states in his affidavit that he did not recollect the circumstance when the petit jury was impaneled, nor did it occur to him until after the verdict had been returned. The counsel of the defen-

1855. dant knew nothing of the fact until after the verdict
January Term. had been given."—"The defendant had once known
Dilworth v. that these men were on the grand jury. The state-
Commonwealth. ment of his not recollecting it is insufficient: An
affidavit to that effect could never be disproved. This
part of the case then presents the question whether
the objection, known to the defendant at the time of
impanneling the jury, but not made till after the ver-
dict, was good on a motion for a new trial. We think
it was not. It was a good cause of challenge; but
being known to the party and not mentioned at the
proper time, the right was waived."

This case is, I think, no authority for the proposition
that a motion for a new trial may be refused when
founded on proof that there was good cause of chal-
lenge to a juror which was unknown to the prisoner
before the trial. On the contrary, the inference to be
drawn from the opinion is strong, that if the court had
been satisfied that the prisoner did not know of the
fact that two of the jury had been of the grand jury
who found the bill, until after the verdict, they would
have set it aside.

And in the case of the *Quinebaug Bank v. Leavens*,
in which the motion was founded on the fact that the
father of a stockholder in the bank was one of the
jurors, the report of the case does not show that there
was any proof or affidavit as to the want of knowledge
of the defendant. The court recognized the propriety
of the general rule forbidding a new trial for extrinsic
causes, if the ground of the petition existed at the
time of the trial, and was either then known to the
petitioner or might have been known by him by using
due diligence. They said that the cause of objection
to the juror furnished legal ground of principal chal-
lenge, if it had been made in due time; but it was of
such a nature that parties might well waive it. "But
it does not appear by any averment in this motion, that

the defendant used any diligence, or made even the ordinary inquiries of the jurors themselves or otherwise, as to their qualifications; although from the fact that a banking corporation was the plaintiff, consisting of numerous stockholders, they might well suspect either that some stockholder, or one or more of their many relatives, might be found upon the jury." And after commenting further on the negligence of the defendant, the court come to the conclusion that it would under the circumstances be wrong to permit the defendant to take the risk of a verdict as he had done, and then to look about for objections; and that he ought to be held to have waived his objections. They say, however, "If an enquiry had been made of the jurors, and this relationship had not been disclosed, or other reasonable pains had been taken, our opinion would have been different.

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The concluding remarks are in accordance with the views of the court in the case of *Vennum v. Harwood*, 1 Gilm. R. 659. In that case the verdict was set aside on the ground that a juror had formed and expressed a decided opinion on the merits of the case adverse to the defendant, which fact was not known to the defendant or his counsel, and the juror having been asked before he was sworn, whether he had formed and expressed an opinion. The court, in concluding their opinion, observed, "The juror, when called, was asked if he had formed or expressed an opinion, and declared emphatically that he had not. The defendant had a right to conclude from this declaration, that the juror was free from bias, and would try the case impartially. He could not challenge him for cause, and there was no apparent reason for a peremptory challenge. It is insisted, however, that he should have examined the juror on his *voir dire* touching his qualification. This practice is allowable, but is seldom resorted to in civil cases. We are not prepared to say that a party is to

1855. be charged with negligence who fails to pursue this course in order to ascertain the competency of a juror."

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The Commonwealth. The juror Flanagan was sworn and tried on his *voir dire*, and stated that he had not made up or expressed

any opinion as to the guilt or innocence of the prisoner, and proved himself free from exceptions; and was thereupon placed upon the panel of twenty-four. It is to be observed also, that the practice here in reference to inserting the names of the grand jurors in the caption of the indictment, is different from that which formerly prevailed, and probably still prevails, in England. There it has been usual to insert the names of twelve of the grand jurors at the least in the caption: And at one time it was held to be essential, as otherwise it might be that the presentment was by a less number than twelve; in which case it would not be good. In later cases, however, it has been decided that the insertion of their names is not necessary. Wharton's Am. Cr. Law 102, 103. According to our practice, and as is the case with the indictment before us, the names of none of the grand jurors are mentioned in the indictment: And there is, therefore, nothing apparent on the indictment to show who the jurors are, except the foreman, who writes on the back of it a true bill, and subscribes his name. There was, therefore, nothing to point to any cause of exception to the juror; nothing to awaken the suspicion of the prisoner that there was any ground of challenge against him. On the contrary, he had resorted to the precaution of examining the juror on his *voir dire*, and the examination had resulted in showing that he was free from exception. If he had failed to use this precaution, and had consented to the juror's being placed on the panel of twenty-four without instituting any enquiry into his qualifications, there might be some ground for imputing to him a want of

diligence. But in the case as it stands, what ground is there for saying that the prisoner was not acting in good faith? Where are the evidences of that gross neglect on which the law is to build the presumption of a waiver of his rights? There is an entire absence of any proof to lead us to believe or even suspect that the prisoner in fact knew of the exception to the juror before he was sworn; and the prompt manner in which he brought it to the notice of the court after he was informed of it by the jailer, is not only a strong circumstance in aid of the statement in his affidavit that he did not know it when the jury was sworn and impaneled, but serves, together with the other evidence apparent on the face of the transaction, to dispel any belief or suspicion that the object of the motion was to create difficulties or throw obstacles in the way of the proceedings.

If, therefore, the first cases cited by the attorney general, stood alone and unexplained, I should still feel great hesitation in recognizing them as authority for a ruling adverse to the prisoner in a state of facts such as we have here. But such is not the case. On the contrary, precedents are not wanting of new trials granted for like exceptions under circumstances certainly not more favorable to the petitioner than those disclosed here. Thus, in the case of *Herndon v. Bradshaw*, 4 Bibb's R. 45, a new trial was granted on the ground that one of the jury who rendered the verdict had served on a former trial of the cause. The grounds of their judgment are thus briefly stated by the court: "There is no doubt but what the juror was incompetent, and might have been challenged before he was sworn; and as that cause was not known to the attorney of Herndon until after the finding of the verdict, (Herndon himself not being present,) it furnished a good cause for a new trial. The court,

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1855. therefore, upon the affidavit of the attorney proving
January Term. the discovery, should have awarded a new trial."

Dilworth v. So in the case of *Page v. The Contoocook Valley Railroad*, 1 Foster's R. 438, a new trial was granted on the

The Commonwealth. ground that one of the jury was discovered after the verdict to be a stockholder in another railroad, which by a contract with the Valley railroad, was interested in the revenues of the latter. The court, after setting out the facts, conclude by saying, "As this objection was not known to the appellant until after the verdict was returned, it was not waived by proceeding to trial without challenge."

The cases of *Commonwealth v. Jones*, 1 Leigh 598; *Heath v. Same*, 1 Rob. R. 735; *Commonwealth v. Hailstock*, 2 Gratt. 564, and *Curran v. Same*, 7 Gratt. 619, cited by the attorney general, decide nothing, I think, in conflict with the claims of the prisoner.

In all of these cases, the applications for new trials, were founded upon the alleged discovery, after verdict, of improper bias in the jurors, which the prisoners endeavored to show existed, but was unknown to them, before the trial. In all of them it is true the applications were unsuccessful. But in none of them do the General court concede the coexistence of the two elements of improper bias in the juror and blameless ignorance of it on the part of the prisoner.

The doctrine to be gathered from those decisions and others of the same class, preceding them, I think substantially is, that when the prisoner excepts to a juror for cause before he is sworn, it is a matter of right to be adjudged by the court; when he excepts after trial for cause existing before the juror was elected and sworn, it is a matter addressed to the discretion of the court; and that in the exercise of this discretion the court ought to consider the whole case, and be satisfied that justice has been done; and that where there is conflict of testimony as to the language

and conduct of the jurors, on which the exception to the jurors is founded, it properly belongs to the judge who presided at the trial to weigh and to decide upon the credibility of the opposing statements of the witnesses and jurors, and to decide, upon all the circumstances of the case, whether there is such proof of perjury and corruption on the part of the jurors as to make it proper to grant a new trial.

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But there is certainly nothing in these decisions, nor as I understand their opinions, in the reasoning of the judges, going to the extent of holding that a new trial ought to be refused when the court is fully satisfied that the juror is incompetent from having pre-judged the case, that the cause of challenge was unknown to the prisoner, and that he was guilty of no laches in failing to discover it and make it known before the trial, merely because the judge who sat at the trial was satisfied that the verdict was in conformity with the evidence. So to decide would be to attach to a faultless ignorance of the facts on which his right depended, all the consequences of a conscious and deliberate waiver by the prisoner of such right, and to allow to the finding of incompetent, prejudiced, and even corrupt jurors, all the virtue and efficacy which belong to the verdict of men, true, lawful and above all exception. Such a doctrine would, it seems to me, be at war with the merciful spirit which governs the administration of criminal law, and is in direct conflict with the whole current of decisions in this country. *McKinley v. Smith*, Hardin's R. 167; *Jeffries v. Randall*, 14 Mass. R. 205; *United States v. Fries*, 3 Dall. R. 515; *State v. Hopkins*, 1 Bay's S. Car. R. 373; *Hardy v. Sproule*, 32 Maine R. 310; *Briggs v. Georgia*, 15 Verm. R. 61; *Commonwealth v. Flanagan*, 7 Watts & Serg. 68; *Sellers v. The People*, 3 Scamm. R. 412; *Cody v. State*, 3 How. R. 27; *Lisle v. The State*, 6 Missouri R. 426; *Tenney v. Evans*, 13

1855. New Hamp. R. 462; *Troxdale v. The State*, 9 Humph. R. 411; *Monroe v. The State*, 5 Georgia R. 142.
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Dilworth v. In the case last cited, the decisions are very fully reviewed, and the doctrine thoroughly and ably discussed; and the result announced is, that where the objection to the juror would be good cause of challenge for favor if discovered in time, it will be ground for a new trial if not found out till after verdict. It is obvious, however, that the application of the prisoner is presented under circumstances far more favorable to him than it would have been if his exceptions to the juror had been taken for the first time, after the verdict. Any degree of negligence may, with very slight aid from other circumstances, be sufficient to ripen and confirm into a judicial belief, that suspicion of unfairness which naturally and justly attaches itself to the conduct of one who, having taken the chances of a trial, seeks to rid himself of an adverse verdict, on the score of objections to his triers existing before they were chosen and sworn. It is difficult, however, to find any foundation in justice for a rule which would impart to the mere swearing of the jury the effect of destroying all those presumptions of innocence which, hitherto, the law allowed to the situation of the prisoner; which, thenceforth, before any evidence of guilt is exhibited, before a witness in the cause is examined, would subject his statements, motives and conduct to all the distrust incident to the position of one against whom a verdict of guilty has been rendered; and which would treat his exceptions to jurors, founded on allegations of recently discovered incompetency, as the suggestions of conscious guilt, bad faith and corrupt scheming.

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We shall, I think, find accordingly, that the principles to be deduced from the modern decisions justify an indulgence to motions to set aside jurors after they are sworn and before they have rendered a verdict,

which would not be allowed to applications for new trials founded on exceptions to jurors, taken after verdict.

With the exception of some early cases, which will be noticed presently, I have been able to find but two cases in England in which questions of the like character with the one under consideration have arisen.

The Queen v. Wardle, 41 Eng. C. L. R. 351, and *The Same v. Sullivan and others*, 35 Eng. C. L. R. 539. In the former, which was a trial for felony, after the jury were sworn without any challenge or objection of any kind, and after one witness had been examined, the foreman of the jury brought to the notice of the court the fact that the prisoner had a relation on the jury; whereupon, it was moved by the prosecution that the jury should be discharged without giving any verdict, and a new jury called and sworn. Mr. Justice Erskine, before whom the trial was conducted, having conferred with Tindal, Ch. J. briefly said—"I have conferred with the lord chief justice, and we are of opinion that I have no power to discharge the jury, and that the case must proceed."

In the latter case, which was an indictment for conspiracy, tried before Lord Denman, Ch. J., after the jury were sworn and the case partly opened, the foreman of the jury stated that he had been on the grand jury which found the bill; and thereupon the counsel for the prosecution offered to consent to withdraw the juror and let the trial proceed with eleven; but the defendants not consenting, the case went on before the jury as at first composed, and the defendants were convicted: And they then moved for a new trial. In the course of the argument, the chief justice said that he was not disposed to say "whether the challenge if taken would have been available or not: but at any rate, the objection should have been stated at the proper time. If it had been mentioned

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1855. before the trial, all of us probably would have agreed January Term.
Dilworth v. The Commonwealth. to exclude the juryman." After a consultation, he delivered a brief opinion, in which he observed, "We think that the objection should have been taken by way of challenge. The defendants here did not challenge; and when the objection was pointed out, and it was proposed that the juror should withdraw, they declined assenting to that course, and preferred to stand upon the strict law." And the rule to set aside the verdict on the ground of a mistrial was denied. As the comments upon the earlier cases, before alluded to, contained in an opinion to be cited hereafter, apply also in some respects to these two cases, it is more convenient to defer any remark upon them till that opinion is cited.

In this country we have also but few opinions on this subject.

In *Ward v. The State*, 1 Humph. R. 253, decided by the Supreme court of Tennessee, after the jury were sworn and impaneled, but before any witnesses were examined, it was discovered that several of the jury were not freeholders; and on the motion of the attorney general, he was permitted to challenge the jurors on account of their disability. They were set aside against the consent of the prisoner, and others were substituted in their place, and the prisoner convicted: And it was held that the prisoner was thereby discharged. The court said that after the jury were sworn, it was too late to challenge any of its members *propter defectum*; that a jury could not be discharged after they were sworn and charged; that the word "charged" did not mean after the jury were sworn and had heard the testimony, or a part of it, but after the prisoner had been placed in the hands of the jury for trial; and that the discharge of the jury after they were sworn and so charged, against the consent of the prisoner, operated his discharge.

In the case of *The People v. Damon*, 13 Wend. R. 351, on a trial for murder, after the fourth juror had been sworn in chief and taken his seat, the district attorney enquired of him whether he had conscientious scruples against finding a verdict of guilty for an offence punishable with death. The counsel for the prisoner objected, that the enquiry was too late; that after the juror was sworn in chief, he could not be objected to. The court overruled the objection, and on the juror's stating that he belonged to a religious denomination who had scruples of conscience against finding a verdict of guilty in a case punishable with death, and that he had such scruples, he was set aside by the court.

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In the course of a very able opinion delivered by Chief Justice Savage, in which the whole court concurred, he observed, "The regular practice is, to challenge jurors as they come to the book to be sworn and before they are sworn; but I apprehend this is a matter of practice, and may be departed from in the discretion of the court. The object is to give the prisoner a fair trial; and if it be made to appear, even after a juror is sworn, that he is wholly incompetent by reason of having prejudged the case, it is not then too late to set him aside and call another. It is indeed laid down in the old books that it cannot be done. Hawkins says a juror cannot be challenged after he has been sworn, unless for some cause which happened after he was sworn, (according to the greater number of authorities,) and cites the year books." 4 Hawkins 387, ch. 43. In *Tyndal's Case*, Cro. Car. 291, the prisoner challenged the foreman of the jury, but he was sworn by the clerk before the challenge was heard by the court; and therefore, without the assent of the attorney general, then present, they would not alter the record; and because the attorney general would not consent to alter the record, the challenge

1855. was disallowed. In *Wharton's Case*, Yelv. R. 24, upon January Term. the arraignment of the prisoner for murder, on the first day eleven jurors appeared and were sworn; one Dilworth v. was challenged, and for that time the trial was stayed. Upon a *tales* taken at another day, when the jury appeared, one of the jurors who had been sworn was challenged for cause which existed before he was sworn. Upon a doubt arising among the judges of the King's bench, Yelverton went into the Common pleas to know their opinion. The opinion was that the queen could not have the challenge after the juror had been sworn. Another matter of doubt was whether those already sworn should not be sworn over again; and the court held that they must be sworn again. The jury acquitted the prisoner. "Wherefore, (says the reporter) Popham, Gawly and Fenner *fuerunt valde irati*; and all the jurors were committed and fined and bound to their good behavior." In the first of these cases, the reason given for the decision of the court is not one calculated to give us very elevated notions of the criminal justice in the reign of Charles I. Because the attorney general would not consent to alter the record, by striking out the name of one juror and inserting another, therefore an incompetent juror must serve. In the second, an incompetent juror was permitted to sit, because the attorney general was not aware, until sworn, of his relation to one of the prisoners; and this, although they admitted that the oath administered was of no effect, by directing him to be sworn a second time. The verdict was such as should have been expected, and, it would seem, ought not to have called down on the whole jury the signal vengeance of the court. It must have been a clear case of guilt; and because the court would not exercise a proper discretion in setting aside an incompetent juror, before the jury was completed or the trial was commenced, they found them-

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selves called upon to punish the whole jury, who probably were led astray by the improper person who was permitted to be one of their number. Hawkins intimates there are authorities the other way; but I apprehend no authority can be necessary to sustain the proposition, "that the court may and should in its discretion set aside all persons who are incompetent jurors at any time before evidence is given."

On the trial of the celebrated Titus Oates, a state of things occurred during the swearing and impanneling of the jury, very similar to that which existed in Tyndal's case. After some of the jury were sworn, the prisoner challenged one of them because he had been on the grand jury, and stated that he intended to have challenged him before he was sworn, but that the clerk had proceeded with such haste as to prevent his doing so. The court replied that he was too late, as the juror was sworn; but the attorney general seeing the palpable unfairness of the proceeding, waived the difficulty, and permitted the juror to be set aside. 10 St. Trials 108.

The objections to the ruling in the cases of *Tyndal* and *Wharton*, presented in the opinion of the Supreme court of New York just cited, seem to me to be very just and proper; and I can see no good reason for denying, in this state, the right and duty of the court to set aside jurors on the score of exceptions *propter affectum*, taken either by the prosecution or the prisoner at any time before the examination of the witnesses has commenced. For in *Martin's Case*, 2 Leigh 745, the General court held, (citing Coke, Foster and Blackstone,) that the separation or discharge of a jury after the swearing and impanneling but before the examining of witnesses, is no ground of objection to a verdict; thus denying the authority of *Ward v. The State*. The same doctrine was reasserted by the court in *Toole's Case*, 11 Leigh 714. And such I

1855. understand is still the rule in England. Roscoe's Cr. January Term. Evi. 222.

Dilworth In this state of the law, the denial by the court in the case of *The Queen v. Wardle*, of its power to set v.

The aside the juror, it will be perceived can have no application in this case, inasmuch as in this case the Commonwealth wealth. motion was made by the prisoner and before any witness had been called, and in that it was made by the prosecutor and after a part of the evidence had been given in. And I think it obvious from the remarks which fell from Chief Justice Denman, during the argument of the motion in the case of *The Queen v. Sullivan*, as well as from the grounds set forth in the opinion of the court, in rendering judgment on the motion, that if the prisoners there, instead of objecting to, had concurred in, the motion of the attorney general to set the juror aside, or had themselves asked that the juror should be set aside on his disclosing the fact that he was of the grand jury that found the bill, the court would have found no difficulty in setting aside the juror. In that case it will be recollect no witnesses had been examined.

So that, it seems to me, a review of the English precedents furnishes no ground for supposing that, in the existing state of the law in England, with respect to the discharge of juries, English judges would now deny their power to set aside a juror at the instance of a prisoner, at any time before the examination of the witnesses had commenced.

And indeed I can see no reasons, other than those suggested by convenience, which would deny to the court the right to set aside a juror, on the motion or by the consent of the prisoner, at any time before the verdict is rendered. It is true that at one time it was held, on the authority of a decision reported in a note to the case of *Chedwick v. Hughes*, Carth. R. 465, that in criminal cases a juror cannot be withdrawn but by

consent; and in capital cases, not even with consent. 1855.
This doctrine, if it ever had any general prevalence, January
has been long since exploded; and I presume there can Term.
be no doubt now, that a motion of a prisoner to set Dilworth
aside a verdict or to be discharged, on the ground of a v.
discharge of the jury, brought about by his motion or The
with his consent, would be promptly denied. Commonwealth.
Waterman's Archibald 172, and notes.

And in Illinois, where they have a statute giving to the court the power, when a juror, after being sworn, is for any reasonable cause dismissed or discharged, to cause another to be sworn in his stead, the practice prevails of setting aside jurors on the motion of the commonwealth and against the consent of the prisoner, even after witnesses have been examined. *Stone v. The People*, 2 Scamm. R. 326. In that case it was discovered, after the jury had been sworn and impaneled and a part of the witnesses examined, that one of the jury was an alien. And he was, on the motion of the prosecutor and against the consent of the prisoner, discharged, and a new juror was sworn in his place; and it was held that there was no cause for setting aside the verdict. And in the case of *Thomas v. Leonard*, 4 Scamm. R. 556, the same rule is applied to civil cases, and the broad doctrine announced, that in all cases a court has a discretion, whenever it comes to its knowledge that a juror has been inadvertently sworn who cannot render a legal verdict, to discharge him.

We have a statute somewhat similar in its provisions to the Illinois statute. The 12th section of chapter 208 of the Code provides that if a juror, after he is sworn, be unable from any cause to perform his duty, the court may, in its discretion, cause another qualified juror to be sworn in his place. And in any criminal case the court may discharge the jury when it appears they cannot agree in a verdict, or that there is a mani-

1855. fest necessity for such a discharge. Whether the incompetency of a juror, from having prejudged the case, discovered before verdict, would be regarded by our courts as an inability to perform his duty, and as presenting a necessity for his discharge, in the contemplation of the statute, it is not necessary to consider.

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Commonwealth. The Whatever may be the proper interpretation of the statute in this regard, it is obvious that it does not expressly or by implication *narrow* the powers of the court, or in anywise *abridge* any discretion before existing, to set aside jurors. Nor do I think that the power of the court in this regard is affected by the provision of the 10th section of chapter 108 of the Code, requiring the twelve selected by lot to constitute the jury.

Without entering, therefore, into a consideration of the circumstances under which the discharge of a jury at the instance of the prosecution and without the consent of the prisoner would or would not result in a discharge of a prisoner, I have come to the conclusion that with us the courts have the right, in their discretion, to set aside jurors, on the score of incompetency, *propter affectum*, discovered after they are sworn, on the motion or with the consent of the prisoner, at any time before verdict rendered; and at the instance of the commonwealth, for like cause at any time, when the discharge of the jury without the consent of the prisoner would not result in a discharge of the latter.

It remains to be considered whether the court ought, in the exercise of its discretion, to have set aside the juror Flanagan under the circumstances disclosed in the prisoner's first bill of exceptions.

I have already expressed the opinion that there was nothing in the conduct of the prisoner from which to infer a waiver of his rights; nothing in his own statements, or in those of his witnesses, to justify doubt as

to their truth. He acted promptly on the information communicated to him by Dawson, and pursued exactly that course which is recommended to persons in his situation, by the court in the case of *McCorkle v. Binns*, 5 Binn. R. 340. That was an application for a new trial, founded on the discovery of objections to a juror after the trial had commenced, but before the verdict. The court said that the defendant, in order to entitle himself to the benefit of the objection, should have disclosed the information promptly to the court. He ought not to have taken the chance of a verdict in his favor, and kept his motion for a new trial in reserve, because the plaintiff and defendant were then placed on an unequal footing. "I mention this (said the judge) for the direction of those who may happen to be in like circumstances in future." The inference is irresistible, that had the defendant acted there as the prisoner has here, he would have obtained relief.

The only circumstance calculated to excite suspicion that the prisoner contemplated some object other than that which was the ostensible one of his motion, is to be found in the answer given by his counsel to the enquiry of the court, how the place of Flanagan should be supplied, or if he was discharged from the jury, what should or could be done; the answer which was given being that the commonwealth had had a grand jury, and now a petit jury, and must remove the difficulty. It certainly would have been more courteous to the judge; it would have stripped the application of the slightest appearance of any wish on the part of the prisoner or his counsel to embarrass the proceedings, if the counsel, instead of replying as he did, had proceeded to point out the mode by which the difficulty suggested by the question of the court might be obviated. But it is difficult to conceive on what principle the prisoner's rights could be compromised by such a conversation. Having brought to the notice of

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1855. the court the facts upon which he supposed his rights
January Term. to depend, and having founded a motion on those facts,

Dilworth v. I cannot see that it was *the duty* of the prisoner or his
Commonwealth. counsel to do any thing more, or how we should be

The justified in imputing to a failure to do more the mo-
tive to gain some ulterior and unfair advantage. The
answer, fairly interpreted, is, "I have submitted my
rights to the court; it is for the court and not for me
to pronounce the judgment of the law upon them,
and to consider what may be the legal consequences
flowing from such judgment." But even if we infer,
from the course of the prisoner's counsel, that he en-
tertained some hope or expectation that the granting
of his own motion by the court might result in some-
thing to his advantage besides simply procuring the
substitution of another juror in the place of Flanagan,
still his declining to point out a mode of obviating
any supposed difficulty could not have the effect of
withdrawing or altering the nature of his motion,
which was plain and unambiguous. If his motion
had been simply to set aside the juror, the question
might have arisen whether granting it as asked might
not result in the necessity of going anew through
the process of forming an entire jury; and in such
case, and in order to obviate the inconvenience and
delay consequent on granting the motion, it might
have been proper in the court, as eleven of the jury
remained free from exception, to have placed the pris-
oner on the terms of consenting that another qualified
juror should be sworn, and that he with the eleven
others should proceed to try the case. But the motion,
as has been seen, was not simply to set aside Flan-
agan, but also to do exactly what we have just sup-
posed the court might have required the prisoner to
consent to, to wit, to substitute another juror in the
place of the one to be set aside. Such being the mo-
tion, the case of Tooel, already cited, furnished a pre-

cedent for the course to be pursued by the court. The 1855.
swearing of another qualified juror in the place of January Term.
Flanagan could not have been made a ground either _____
for a discharge of the prisoner or a new trial. Dilworth
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There remains yet another enquiry, and that is, The
whether the objection to the juror was removed by Commonwealth.
his statements made on his second examination on the
voir dire.

I think it questionable at the least, whether the juror ought to have been subjected to such a test. Where the objection to the juror is founded on the proofs of favor deduced from statements alleged to have been made by him, his denial or explanation of such statements may and often does serve to satisfy the mind of the court of his indifference. But when, as here, the law attaches a presumption of bias or favor to the fact of the juror's having been on a former jury, it is difficult to conceive of any statement by which that presumption can be wholly removed. For if the juror on his examination should state the only fact that could well wholly disprove the formation of opinions or impressions unfavorable to the prisoner, from the evidence given before the grand jury, to wit, that the indictment was found and returned by twelve of the grand jury, against his opinion and consent, he would at once show himself liable to exception on the part of the prosecution, having already adjudged the prisoner not guilty on the *ex parte* showing of the prosecution, and without any aid from the prisoner's testimony. And even upon the concession that it was allowable to examine the juror on trying the exception to him, I should doubt whether his statements, of having paid little attention to the testimony, and of being governed by what the jurors said as well as what was testified to by the witnesses, accompanied by the disclaimer of having formed or expressed any opinion as to the guilt or innocence of the accused,

1855. were such as ought in any case to be received as a
January sufficient answer to the presumption which the law
Term. attaches to his position. For of so serious a character

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The Commonwealth. is the exception to a petit juror, on the ground of his having been one of the grand jury who found the bill,

that according to Lord Hale, it is an offense punishable by fine for a man who was one of the inditors, and who was returned as one of the petit jury, not to challenge himself. 2 Hale Pl. C. 309. And when I look to the whole conduct of the juror, it seems to me that there are peculiar circumstances in his case rendering him not only liable to the challenge of the prisoner, but also exposes him to the just censure of the court.

On his second examination he discloses the fact that before he was summoned as a petit juror, he had in a conversation with Dawson told him that the sheriff had informed him (the juror) that he anticipated difficulty in getting a jury, who had not made up or expressed an opinion; and that he had also said to Dawson that he did not expect to be summoned, as he was on the grand jury. It appears that he served on the grand jury on the 19th of September; and yet on the 26th of the same month, only one week thereafter, when called as a petit juror in the case, notwithstanding his recent conversation with Dawson and the brief interval which had elapsed since he acted as a grand juror in the case, he failed upon his *voir dire* to disclose the fact that he had been on the grand jury, and proved himself free from exception. And upon his second examination he still failed to assign any reason or give any explanation why he had not made known the fact of his being one of the grand jurors; but opposes to the inference of his having prejudged the case which the law deduces from the capacity in which he had acted, a denial of having formed any opinion, and places his freedom from such opinion to the ac-

count of his having discharged his duties as a grand juror in a loose, imperfect and careless manner. I cannot, in this state of things, say that the legal presumptions against his fitness and competency have been removed. Whatever may have been his motive, I cannot say that he appears free from all exception. I hold with the learned judge who delivered the opinion of the court in *Clarke v. Goode*, 6 J. J. Marsh. R. 37, that "It is not only important that justice should be impartially administered, but where it can be effected without the violation of any rule of propriety, that it should flow through channels as clear from suspicion as possible." I cannot recognize the justice or propriety of a rule which would force a prisoner against his consent to enter upon the hazard of a trial, by a juror, standing in the predicament in which the juror Flanagan is presented by the record of this case. And I think the prisoner is entitled to a new trial.

ALLEN, P. and SAMUELS, J. concurred in the opinion of DANIEL, J.

MONCURE and LEE, Js. dissented.

Judgment reversed, and new trial awarded.

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Term.**JOHNSON v. THE COMMONWEALTH.—Three Cases.****GARY v. THE SAME.****PANKEY v. THE SAME.**

May 17.

A master may give a general written consent to the purchase by his slave of ardent spirits of a particular person; which will be valid to protect the seller from incurring the penalties prescribed in the Code, ch. 104, § 1, p. 459.*

These were indictments in the Circuit court of Appomattox county for selling ardent spirits to slaves without the written permission of their master. The facts are stated by Judge ALLEN in his opinion. Judgments having been rendered against the parties, they applied for writs of error, which were allowed.

*August & Randolph, for the appellants.**The Attorney General, for the commonwealth.*

ALLEN, P. These five cases present substantially the same question, and were argued and may be considered together. They were presentments found against the several plaintiffs in error for selling ardent spirits to different slaves of John H. Johnson, without the written consent of the master. The parties having appeared and pleaded not guilty, the court proceeded to hear and determine the cases without a jury, and rendered judgment in each case for twenty dollars,

*The act says, "If any person sell wine, ardent spirits, or any mixture thereof, or any other intoxicating liquor, to a slave, without the written consent of his master, he shall forfeit to the master four times the value of the thing sold, and also pay a fine of twenty dollars."

the fine imposed by law, and the costs of prosecution. From the certificate of facts in each case, it appeared that the commonwealth proved the sale of the ardent spirits, as charged in the presentment; and thereupon the plaintiffs in error in their defense produced a writing, proved to have been executed and delivered to them by the owner of the slaves, authorizing them to sell to his slaves, or any of them, merchandise or liquor, upon the responsibility of the slaves purchasing. The sale in each instance was made some months after the date of the writing; and the only question is, whether the master could give such a general authority to sell to his slaves, so as to protect the seller from the penalties of the law.

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son's
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The prosecutions were founded on the Code, ch. 104, § 1, p. 459, which provides, that if any person sell wine, &c. to a slave without the written consent of his master, he shall forfeit to his master four times the value of the thing sold, and also pay a fine of twenty dollars. There is nothing in the terms of the act which requires a special written consent for each act of selling. The law, though intended to guard the interests of the public, did so through the interests of the owner. He is the party most interested in preventing his slaves from purchasing ardent spirits, or dealing in other articles with third persons; for he is the party most likely to be injured by such acts. When therefore he gives his written consent, whether general or limited, the requisitions of the law would seem to be satisfied, even if no other forfeiture than the fine to the commonwealth were incurred. But the act, in addition to the fine to the commonwealth, subjects the offender to a forfeiture to the master of four times the value of the thing sold. The written consent was given in such general form to relieve the owner from the trouble of giving such consent in writing for every purchase or sale provided for in the

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first and second sections of the law under consideration. He intended it as a consent to any sale as long as the authority was unrevoked, and could not be injured by the seller doing what he had expressly permitted. But unless the selling was such a violation of his rights as master, as subjected the seller to the forfeiture to the amount of four times the value of the thing sold, no offense was committed against the public. The act complained of must subject the offender to the forfeiture as well as the fine. And if no injury is done to the owner, there is no offense against the public; for the injury to the community grows out of the improper dealing with the slaves without the owner's consent. I think that upon the facts certified, no offense was committed; and that judgment should have been rendered discharging the plaintiffs in error from the prosecution.

The other judges concurred in the opinion of ALLEN, P.

Judgment reversed, and entered for the appellant.

Richmond.**VAIDEN v. THE COMMONWEALTH.**1855.
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May 21.

1. A bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial, on the ground that the verdict is contrary to the evidence, is to be framed in the same way as the bill of exceptions in civil cases to the like refusal is framed. And if the evidence is certified instead of the facts proved, the appellate court will only look to the evidence introduced by the commonwealth.
2. In reviewing the judgment of the court below, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict.
3. On a trial for murder, the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct.

At the March term 1855 of the Circuit court of Lunenburg county, Isham W. Vaiden was indicted and tried for the murder of James A. Winn. The jury found him guilty of voluntary manslaughter, and fixed his term of imprisonment in the penitentiary at four years; and the court sentenced him accordingly.

After the verdict was rendered, the prisoner moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and the prisoner excepted.

The bill of exceptions commences by stating that on the trial of the cause, it was proved by, &c. and then states the name of a witness, and proceeds to give his statement; and so it proceeds, giving the name of each witness and what he stated, until near the close of the bill of exceptions, when it is stated it was proved by several witnesses, that for the last eighteen months or two years Winn had been a drinking man, and that when drinking he was a quarrelsome, turbu-

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lent man; though some regarded him as a coward; and that Vaiden was an amiable and peaceable man, although a drinking man. And the exception then concludes: And this being the testimony in the case, &c.

The first witness examined for the commonwealth, Pennington, stated, that on the night of the 29th of December 1854, he went to the house of the prisoner, to the wedding of the prisoner's daughter, and got there about half an hour after nightfall. That he found the prisoner and the deceased playing cards when he arrived; and that they continued their game from twenty-five to thirty minutes afterwards. When they stopped playing, Vaiden said to Winn, you owe me five dollars, which Winn did not deny, but discovering a card under the table, accused Vaiden of putting it there. Vaiden then said he had not put it there, and Winn said he had not. Winn then accused Vaiden of having cheated him. Vaiden said he had not, and Winn called him a damn'd liar. Mrs. Vaiden, the wife of the prisoner, taking hold of Winn, said to him, I thought you promised me to have no fuss here. Winn replied that he did; and at the instance of Mrs. Vaiden, Winn left immediately, saying "good night," and went into the yard. He remained there some five minutes, cursing and talking loud, and seemed to be enraged; but witness could not distinguish his words, the door being shut. Vaiden then went to the door and told Winn he owed him five dollars, and Winn said to him, Come out here, you damn'd old rascal, and I will pay you your five dollars. Winn then came and asked for his gun, which George Vaiden, the son of the prisoner, handed to Mrs. Vaiden, and she handed it to Winn through the door. At this time this witness and Harding left the house and joined Winn in the yard. Whilst Winn was talking loudly in the yard and before his gun was handed to him, Vaiden

took up his gun and went towards the door; but his wife persuading him, he set his gun down.

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Witness and Harding mounted their horses, and in company with Winn, who was walking, went towards the gap on the path leading from Vaiden's house to the main road. George Vaiden joined them a few yards from the house; and as the party were going to the gap, Winn told George Vaiden, that if he had said any thing to hurt his feelings or his mother's, he asked their pardon; but tell your father, a damn'd old rascal, that the first time I catch him out of his plantation, I will flail him well. The whole party went through the gap, and George Vaiden put up the fence. Witness and Harding left Winn and George Vaiden outside of the gap in not unfriendly conversation; Winn telling him the particulars of a fracas he had recently gotten into at Lunenburg court-house. When witness had rode about a quarter of a mile from the gap he heard a gun fire, but did not return. Witness did not see the cap taken off Winn's gun before it was handed to him; and heard no one tell George Vaiden or any one else to take it off.

Harding proved the same facts as Pennington, and his statement as to the taking off the cap from Winn's gun was the same. He saw and heard nothing of it.

Dr. Saunders, another witness for the commonwealth, was called to see Winn as a physician. Found him dead when he arrived, and the body lying in the corner of the fence inside, about two panels from the gap spoken of by Pennington. Thought he must have been shot at a distance of not more than three feet. Found Vaiden bleeding from a wound on the forehead, which witness thought was inflicted with the breach of a gun. Thinks Winn must have inflicted this blow after he was shot, because, if inflicted before, such an instrument wielded by a man of Winn's strength, must inevitably have crushed the skull of

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Vaiden. The body of the deceased lay where he died until the inquest was held the next day. The night was cloudy, but the moon was full; and the figure of a man could be distinguished at the distance of thirty yards. The gap was two hundred and seventeen steps from the house.

George Vaiden, another witness for the commonwealth, a son of the prisoner, gave the same account of what passed at the house, and to the time Pennington and Harding left him and the deceased at the gap, as was given by them. He further stated, that after the gap was put up he and Winn stood on the outside leaning against a panel. Winn had his side face towards the house, and was telling witness of a fracas he had had at Lunenburg court-house, when he suddenly exclaimed, "Yonder comes the damn'd old rascal, and I'll flail him now;" and jumped over the fence, and clubbed his gun soon after he jumped the fence, in both hands, about half way the barrel, and rushed upon the prisoner. As Winn jumped over the fence, witness distinctly heard the prisoner tell him not to approach him; if he did, he would shoot him. Winn did not stop, but rushed on the prisoner with his gun raised in both hands, grasped about half way the barrel. The prisoner stepped back one or two steps; and when Winn got within a few feet of him, fired. Winn struck the prisoner two blows with the breech of his gun after he was shot, and then staggered back; and then both of them fell together. Witness thinks they closed, and that Winn pulled the prisoner down with him. Witness did not see the prisoner till Winn made his first exclamation; and when witness saw him he was about fifteen feet from the gap, in the usual walking path from the house, which was on the north edge of the cart path.

Witness took the cap from Winn's gun at the suggestion of Reuben Clarke, before he handed it to his

mother who handed it to Winn. Does not think any one else heard Clarke, who spoke in a low voice. Prisoner could not have seen him take it off, as a door, which was about half open, was between them.

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Benjamin Yates, another witness for the commonwealth, lived about five or six hundred yards from Vaiden's house. The next morning Vaiden came to the house of witness, when in reply to a remark he made, witness asked what was the matter; and the prisoner said he had killed Jimmy Winn. Witness told him that he reckoned not, and prisoner replied that he had; and said there was another damn'd rascal in the neighborhood, who, if he didn't look sharp, would be killed too. That the deceased was a damn'd dog, and ought to have been killed twenty years ago, and that some body had to do it; and didn't witness think so. Prisoner told witness that Winn had struck him two blows over the head before he shot him; and that both he and Winn were tolerably tight. Prisoner looked as if he had been drinking a good deal the night before, but was not drunk when he came to the house of witness in the morning. The deceased was a quarrelsome man when drunk, and for the last eighteen months or two years had had a great many frases. He could manage Vaiden easily. He was a large, muscular man, about forty-two years of age; and Vaiden a small man, about sixty years old.

Reuben Clarke, a witness for the prisoner, gave substantially the same account of what occurred in the house as the other witnesses, up to the time of their leaving. He confirmed what George Vaiden said about taking off the cap of the gun at his suggestion; and that the prisoner did not see it done. He states that after Winn had left the yard, Vaiden walked up and down the room, and asked "where is George?" two or three times, and seemed uneasy. He then took his gun and started out, and upon Mrs. Vaiden's ask-

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ing him not to go out, he said he would have no difficulty. About three or four minutes after Vaiden went out, witness heard the report of a gun, and went out to where Winn lay. Winn lived about twenty or thirty minutes. Whilst Mrs. Vaiden and witness were standing near Winn, he asked Vaiden to forgive him. Vaiden did not appear to hear him at first. Winn repeated it, and Vaiden said "All right," or something signifying that he did forgive him. Vaiden's forehead was cut about three inches; and he said that Winn had struck him there.

Moremus, another witness for the prisoner, his son in law, gave substantially the same account of what passed in the house as the other witnesses. He heard and knew nothing at the time of the taking off the cap from Winn's gun. His account of Vaiden's going out of the house to see after his son George, is the same as that of Clarke.

The prisoner applied to this court for a writ of error, which was awarded.

Howard, for the prisoner.

The Attorney General, for the commonwealth.

LEE, J. Upon the threshold of this case we are met with the objection that the bill of exceptions taken to the opinion of the court overruling the motion for a new trial, contains only a statement of the evidence given on the trial of the cause, and not a certificate of the facts proved: And the question presents itself, whether the rules by which this court is governed when reviewing the action of a Circuit court in granting or refusing a motion for a new trial in a civil cause, apply also in criminal cases; and if they do, we have then to determine the true character of the certificate contained in the bill of exceptions, and the manner in which the same must be considered in the present case.

The rule propounded by this court in *Bennett v. Hardaway*, 6 Munf. 125, was that a bill of exceptions to a decision of the court below upon a motion for a new trial, should not set out all the evidence given upon the trial of the cause; but should state the facts which appeared to the court to have been proved by the evidence. The principle which lies at the foundation of the rule is, that as it is the function of this court to pass upon the very case which was before the court below, and with the same lights and the same materials by which to form its judgment, it cannot have that case and those lights and materials if it should be called upon to pass on the weight of testimony and the credibility of witnesses. The court below has the witnesses before it, and can observe their manner and demeanor in giving their testimony. This court only sees their testimony on paper, and has not the same means of judging of the weight due to it, and of the credibility of the witnesses. Hence an exception taken on such an occasion should not be so framed as to cast upon this court the duty of judging as to the credibility of the witnesses or the weight due to their testimony. And it would seem that the reason for the rule applies in all its force in criminal cases. In these, this court can no better nor more successfully perform the task of weighing testimony than it can in civil cases. Its inability to determine the credibility of witnesses must be the same in both.

Looking, then, to the bill of exceptions, it would seem from its form to be somewhat uncertain whether it was intended by the judge to be a certificate of the facts proved, or merely a statement of the evidence on both sides. The names of the witnesses are all given, excepting those who were called to prove the habits and general deportment of the prisoner, and the deceased; and each witness is stated to have "proved" what is there narrated. But the exception concludes

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1855. thus : "And this being the testimony in the case, the
April Term. jury found, &c." The mere form of the certificate in
Vaiden's Case. a bill of exceptions may, it is true, be extremely falla-
cious, for it may profess to state the facts proved, and yet in effect amount only to a mere statement of the evidence. Such was the certificate in the case of *Jackson's adm'r v. Henderson*, 3 Leigh 196. And in any case, as correctly stated by Judge Baldwin, in *Patterson v. Ford*, 2 Gratt. 18, 33, whether a judge means to certify the testimony of a witness or the facts which he proves in the shape of evidence, is a matter that depends more on the substance than the form of the bill of exceptions. If we examine, then, the statement which follows the name of each witness as given, we will find that it is a mere narrative of his testimony as given in by him at the time. In some instances, two or more of the witnesses speak as to the same circumstances, but do not state them precisely in the same way. Thus the witness Pennington and the witnesses Clarke and Moremus are not agreed as to whether the deceased accused the prisoner of putting the card under the table before or after the prisoner claimed the five dollars of the deceased. Pennington says that the prisoner claimed the five dollars, and that the deceased then discovered the card under the table, and accused the prisoner of putting it there; while Clarke and Moremus testify that the deceased discovered the card under the table, and accused the prisoner of putting it there, before any thing was said by the prisoner about the five dollars. So in regard to the material fact, whether the blows which the deceased inflicted upon the prisoner were given before or after the prisoner shot the deceased, there is much uncertainty. There is some testimony tending to show that the blows were inflicted before the shot, while the testimony of George Vaiden is that the blows were struck after the shot; and Dr. Saunders, another wit-

ness, expresses the opinion that the mark on the head of the prisoner must have been caused by a blow inflicted after the shot, because if the blow had been given by such a man as the deceased before he was shot, it must inevitably have crushed the skull. So the witnesses who depose as to what the deceased said to George Vaiden about his father when they were going away from the house, do not agree exactly as to what the deceased did say. Other discrepancies in the statements of the different witnesses might be noticed. It will be observed also, that with regard to several matters, some of the witnesses express merely the opinions they entertained at the time of the trial, without undertaking to state directly how the facts really were. Now the facts and circumstances attending the occurrence must of course all harmonize and consist; they cannot be varied according to the varying statements of the witnesses; nor can they be made to depend upon the correctness of their opinions, or the logical accuracy of their deductions. Neither is this court much better prepared to judge of the weight due to their opinions than of the credit to which their statement of facts may be entitled.

It seems to me that it is impossible to read the bill of exceptions without seeing that it is but a mere detail of the evidence (as the judge terms it himself in the concluding part of the bill of exceptions) given in by the witnesses at the trial, excepting only the proofs as to habits and deportment, and not a certificate of the facts of the case. That it is evidence liable to be impeached by the circumstances of the transaction, whether successfully or not, and which it was the peculiar province of the jury to weigh and consider, cannot be doubted. And thus, according to the test prescribed in the opinion of Judge Baldwin in *Patterson v. Ford*, 2 Gratt. 18, 33, the matter of it, however certified, cannot be treated as facts proved before the

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1855. jury. In the case just referred to, the bill of exceptions was held not to have been well taken, and upon comparing it with that in the present case, it will be found (so far as parol testimony is set out) very nearly to resemble it in the form of statement and the manner of the certificate.

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Regarding the bill of exceptions then as not well taken according to the rule of *Bennett v. Hardaway*, we must reject the evidence on behalf of the prisoner, and examine the case upon the evidence on the part of the commonwealth, according to the modification or explanation of the rule established by subsequent cases. *Ewing v. Ewing*, 2 Leigh 337; *Green v. Ashby*, 6 Leigh 135; *Rohr v. Davis*, 9 Leigh 30; *Pasley v. English*, 5 Gratt. 141. And in passing upon the case as presented by the evidence, we must be governed by the same rules, and conform to the same principles, which prevail in civil cases. In the latter, it is true the jury are to weigh the evidence and to decide according to its preponderance, while in criminal cases it has been usual for the courts to advise the jury to require clear and satisfactory proof of the guilt of the prisoner before they bring in a verdict of conviction: and if they entertain a reasonable doubt of his guilt, to give him the benefit of the doubt, and bring in a verdict of acquittal. But this is a matter for the guidance of the jury in the performance of their especial and peculiar function of responding to the questions of fact involved, and not for the government of the court before which the trial is had, in reviewing the action of the jury, and still less for that of this court in reviewing the action of that court. This court can only enquire whether the verdict is warranted by the evidence before it; it certainly cannot enter upon an enquiry whether the jury should not have entertained a reasonable doubt of the guilt of the prisoner, and set aside the verdict or suffer it to

stand, according to the supposed result of such an enquiry. In *Grayson's Case*, 6 Gratt. 712, 723, Judge Scott, in delivering his opinion, in which two of the three judges who sat with him expressed their entire concurrence, states it as a proposition deducible from the decisions of the General court, that motions for new trials are governed by the same rules in criminal as in civil cases. Judge Lomax, who was sitting in the case, also concurred in the judgment of the court, and in the opinion of Judge Scott, excepting that he was not prepared to admit in the unqualified manner therein expressed, an analogy between motions for new trials in civil cases and similar motions in criminal cases. He did not proceed to point out any difference between them, and all I apprehend that he meant was to intimate that it was a subject on which he had not matured his opinion, and did not deem it necessary to express any upon that occasion. I have been able to find no case in the decisions of the General court, nor has any concurred in this court, which establishes any different rule by which a motion for a new trial in a criminal case is to be determined from that which would prevail in a civil case; nor do I think any sufficient reason can be shown for making any distinction between them in this respect.

Now, whatever may be the rule in cases where the bill of exceptions is well taken, and states the facts proved, and not the evidence merely; whether in such case the appellate court would be influenced by the opinion of the jury and of the inferior court, or without regarding it, would proceed to judge for itself originally, and determine whether the proper inferences and conclusions were made and drawn from the facts, according to the opinion of Judge ALLEN in the case of *Slaughter's adm'r v. Tutt*, 12 Leigh 147, and as would seem to have been done in the case of *Governor for Fisher v. Vanmeter*, 9 Leigh 18, there can be no

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doubt that where the court has to pass upon the evidence in the cause, a new trial ought not to be granted except in a case of plain deviation or of palpable insufficiency of evidence; and not in a doubtful case, merely because the court, if on the jury, would have given a different verdict. The same reasons which led to the establishment of the rule in *Bennett v. Hardaway*, would apply in all their force when the court is called upon to pass upon a motion for a new trial upon the evidence against the exceptor, and would forbid its being granted except in a case of plain deviation. And this, I think, is to be deduced from the decisions of this court and the opinions of several of the judges. See *Ross v. Overton*, 3 Call 309; *Brugh v. Shanks*, 5 Leigh 398; *Mays v. Callison*, 6 Leigh 230; *Brown v. Handley*, 7 Leigh 119; *Mahon v. Johnston*, 7 Leigh 317; *Slaughter's adm'r v. Tutt*, 12 Leigh 147. And this has been clearly recognized as the correct rule by the General court in criminal cases. Thus, in *McCune's Case*, 2 Rob. R. 771, it was held that although where the finding of the jury is clearly against the evidence, or clearly without evidence to justify it, it is the duty of the court to set the verdict aside upon the application of the prisoner, and to grant him a new trial; yet if the evidence be circumstantial, and the court before which the case was tried, has refused to grant a new trial, the verdict should not be disturbed by the appellate court, even although in the opinion of that court the evidence do not amount to very clear and strong proof. And in *Hill's Case*, 2 Gratt. 594, *Mc Whirl's Case*, 3 Gratt. 594, and *Grayson's Case*, 6 Gratt. 712, it is declared that a new trial should not be granted merely because the court, if upon the jury would have given a different verdict; but that to justify the granting of a new trial, the evidence should be plainly insufficient to warrant the finding of the jury. In *Grayson's Case*, 7 Gratt. 613,

there had been two trials and two convictions ; and the court said that if in their opinion the evidence made even a probable case of guilt, they would be unwilling to disturb the verdict; but being of opinion that the testimony was not only not sufficient to prove the guilt of the accused, but that it was hardly sufficient to raise a suspicion against him, a new trial was awarded.

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According to these views then, this case resolves itself into an enquiry whether, looking to the evidence on the part of the commonwealth, it is found to be plainly insufficient to warrant the finding of the jury; for if not so plainly insufficient, we will not be justified in granting a new trial even if we should think that, had we been upon the jury, we might have found a different verdict.

The fact of the homicide by the prisoner is not controverted, and the jury by their verdict have ignored the malice which is necessary to constitute murder, and have convicted the prisoner of manslaughter. But it is urged on his behalf that the killing was clearly in self-defense, and that upon that ground he should have been wholly acquitted.

When a man is assaulted in the course of a sudden brawl or quarrel, he may in some cases protect himself by slaying the person who assaults him, and excuse himself on the ground of self-defense. Before a party thus assaulted, however, can kill his adversary, he must have retreated as far as he safely could to avoid the assault, until his further going back was prevented by some impediment, or as far as the fierceness of the assault permitted. He must show to the jury that the defense was necessary to protect his own life, or to protect himself against grievous bodily harm. 4 Black. Comm. 184; 1 Hale P. C. 481 *et seq.*; 1 Russ. on Cr. 661. And with regard to the necessity that will justify the slaying of another

1855. in self defense, it should seem that the party should not have wrongfully occasioned the necessity; for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself.
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1 Hawk. P. C. ch. 10, § 22, p. 82; 1 Russ. on Cr. 669; 1 Hale P. C. 405.

Now, it appears that on the night in question the deceased was at the house of the prisoner, where a marriage was expected to take place; and he and the prisoner were drinking and playing cards together. An altercation took place between them, growing out of the deceased charging the prisoner with cheating. The wife of the prisoner then took hold of the deceased and reminded him of his promise to have no "fuss" there. The deceased assented, immediately bade "good night," and went out into the yard. There he remained, however, some five minutes, apparently enraged, cursing and talking loudly. While he was thus engaged, the prisoner took up his gun and walked towards the door, but was induced by his wife's persuasion to set the gun down. After he went out, deceased demanded his gun, which he appears to have left behind him in the house, and it was handed to him through the door by Mrs. Vaiden. Deceased then went away on foot in company with two other persons, who rode away on horseback, and George Vaiden, son of the prisoner, went with them as far as the drawbars, some two hundred yards from the house, for the purpose of letting them through. The deceased had been in conversation with George Vaiden, and after the party went through the gap, he continued the conversation with him as they both stood together on the outside of the fence leaning against one of the panels. The night was cloudy, but the moon was at its full, and the figure of a man could be distinguished at the distance of thirty yards. The conversation be-

tween the deceased and George Vaiden was of no unfriendly character, and had changed from the events of the evening to a "fracas" which the deceased had had at Lunenburg court-house, of which he was giving George Vaiden the particulars. While thus engaged, and when the prisoner had approached within fifteen feet of where they were standing, the deceased, according to the testimony of George Vaiden, suddenly exclaimed, "Yonder comes the damned old rascal, and I'll frail him now," jumped over the fence, clubbed his gun about half way of the barrel, and rushed upon the prisoner, who told him not to approach, or he would shoot him. Deceased, however, did not stop, and the prisoner gave back one or two steps, and when the deceased got within a few feet of him, fired. The deceased then struck the prisoner two blows with the breech of his gun, and then staggered back and fell mortally wounded, and died in a short time afterwards.

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Nor, it can scarcely be said that the homicide here occurred in the course of a sudden brawl or quarrel. The altercation had taken place at the house, and the deceased had gone away, to all appearances peaceably, and had got out into the main road, and here he was standing conversing quietly with George Vaiden, when the prisoner followed him out: and this must have been between twenty minutes and half an hour after the deceased had left the house; ample time certainly for the irritation of the first altercation to have subsided. Still less can it be said that the prisoner was wholly without fault in bringing the necessity of killing the deceased upon himself, if such necessity did in fact exist. After the deceased had gone away, why should the prisoner have followed him with his gun? Why go out at all? If it be said that the prisoner may have been afraid his son might receive some harm at the hands of deceased, the answer is, that there was

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no ground for any such apprehension. The deceased had had no altercation with the son, nor had the latter participated in that which occurred between him and the prisoner. And if it be supposed that the prisoner might have thought that possibly his son might undertake to resent the insult offered to his father by the deceased, and then be brought into a difficulty with the prisoner, in which he might need his assistance, the prisoner could not but have discovered that any such apprehension was groundless; for he must have seen when he went out, and before he was observed by the deceased, that there was no quarrel between his son and the deceased, and that they were conversing in a quiet and not unfriendly manner. He could discover them at the distance of thirty yards, and yet he advanced to within about fifteen feet of them before he was observed by the prisoner. That he went out with his gun with the expectation of an affray, cannot be doubted, and it is far more probable that his object was to provoke one than to protect his son. In fact, whilst the deceased was still in the yard, and the prisoner's son yet in the house, the prisoner had taken up his gun and gone towards the door unquestionably with a hostile purpose towards the deceased; but had yielded to the persuasion of his wife, and set the gun down. That such must have been his purpose is still further evinced by what he said to the witness *Yates* on the morning after the occurrence, when he informed him that he had killed the deceased. He added, that "there was another damned rascal in the neighborhood, who, if he didn't look sharp, would be killed too; that the deceased was a damned dog, and ought to have been killed twenty years ago, and that some body had to do it." And he asked the witness if he didn't think so? This was early in the morning, but the prisoner was sober; and it reflects a strong light upon the true character

of the occurrences of the previous evening, and the motives and conduct of the prisoner. It tends to show that the necessity for slaying the deceased, if such necessity lay upon the prisoner, was of his own seeking, and self imposed. He made no allusion in this conversation to any peril of his life in which he was placed by the assault made upon him by the prisoner, though he did say that the prisoner had struck him two blows on the head before he shot him. The necessity which seemed at that time to be impressed upon his mind, was rather that of ridding the community of one whom although at that moment lying stiff and cold in death on the ground in a fence corner, and slain by his hand, he stigmatized as a damned dog that ought to have been killed twenty years before, than of taking his life for the purpose of avoiding imminent danger of death to himself.

Considering the whole conduct of the prisoner on the evening in question in connection with the state of feeling which he avowedly entertained towards the deceased, I think it very difficult to say that he was free from fault upon that occasion, or that his case comes within the rules which renders homicide justifiable or excusable on the ground of necessary self-defense. Nay, if the jury had gone further and found the prisoner guilty of murder, it might be a matter of grave consideration whether the verdict could have been disturbed upon the ground that there was no sufficient evidence of the malice which is necessary to constitute that crime. Certainly, I am not prepared to say that this verdict is a plain deviation from right and justice, and that the evidence is clearly insufficient to warrant it.

In conclusion, I would remark that it can scarcely be doubted the exact weight due to the testimony of George Vaiden must have been matter of serious consideration with the jury. He was the only person

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who was present at the time the homicide was committed, and he was called as a witness almost as a matter of necessity. But he was the son of the prisoner, and of course under the strongest inducements to make his account of the occurrence as favorable to his father as he could; and there would seem to be some apparent discrepancy between his account of the manner in which the affray took place, and the spot at which the death wound was inflicted, and circumstances proved by himself and others. It is certainly true as a general rule, that a party is not permitted to impugn the credibility of a witness called by himself, by general evidence showing him to be unworthy of belief. There are exceptions, however, to the rule, as in the case of a subscribing witness whom the law obliges the party to call. Whether the case where there is but a single witness present at the homicide, and who is therefore called on behalf of the commonwealth in a prosecution for murder, should constitute another exception, as argued by the attorney general, I undertake to express no opinion. But in any case the party calling a witness may give evidence in direct contradiction of what he has testified; and not only where the witness was innocently mistaken, but even where the evidence may have the effect collaterally of showing that he was unworthy of belief. 1 Greenl. Ev. § 448, and cases cited in the note. I forbear, however, to dwell upon this point, because in the view I have already taken, the result must be unfavorable to the prisoner; and it is therefore unnecessary to determine whether there is not such necessity for passing on the weight due to the testimony of the witness George Vaiden, as would according to the rule preclude the court from undertaking to review the action of the jury and of the court below.

I think no sufficient reason is shown for disturbing

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the verdict of the jury, and am of opinion to affirm the judgment.

ALLEN, P. and **MONCURE** and **SAMUELS, Js.** con-curred in the opinion of **LEE, J.**

DANIEL, J. dissented. He regarded the certificate of the Judge of the Circuit court as a certificate of facts; and thought that the facts proved a case of homicide in self-defense.

JUDGMENT AFFIRMED.

INDEX.

ADMINISTRATION.

1. If a County court commits an estate to the sheriff for administration before the expiration of three months from the death of the testator or intestate, the act is not void but voidable. *Hutcheson, sheriff, adm'r &c. v. Priddy,* 85

2. In such a case, the County court having general jurisdiction to grant administration, the act of the court in committing the estate to the sheriff, cannot be questioned in any collateral proceeding. *Idem,* 85

3. An estate having been committed to the sheriff, the County court cannot grant the administration to a distributee without notice to the sheriff of the application.

Idem, 85

4. It is not imperative on the County court to grant administration to a distributee, after the estate has been committed to the sheriff; but there is a legal discretion in the court.

Idem, 85

ADVANCEMENTS.

1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.

Knight & wife v. Oliver & als. 33

2. The slaves allotted to the widow are not a part of the distributable surplus, to be divided among the children at the death of the intestate; and a child refusing to bring his advancements into hotchpot upon the first division, is not thereby precluded from claiming his share in the division of the dower slaves. *Idem,* 33

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3. **QUERE:** If this right to postpone his election whether or not he will take a share of the estate, exists as to any estate other than the dower slaves. *Idem,* 33

4. A child having received advancements and refused to share in the first division, but claiming to share in the division of the dower slaves, is to be charged with interest on his advancements or their value, from the death of the intestate to the date of the division. And if the principal and interest of his advancements exceed the amount received by the other children, he is then to be charged with interest on such excess from that time to the period of the second division. But having elected not to come in on the first division, if his advancements, with interest thereon, were not equal to the shares of the other children in that division, he is not to have the deficiency made up on the second division. *Idem,* 33

5. Advancements made by a testator in his lifetime are not to be taken into account in fixing the proportion of the debts of the testator which each devisee and legatee is to pay, though they are directed to be charged to them in the distribution of the residuum of the estate.

Gaw v. Huffman, 628

AGENTS.

See *Principal and Agent.*

ALEXANDRIA.

The act of 5 George 2, ch. 7, § 4, subjecting lands, slaves, &c. in the colonies, to the payment of debts, was the law of Alexandria county in

the district of Columbia from June 14th, 1812. *Suckley's adm'r v. Rotchford & als.* 60

ALIENS.

1. A subject and citizen of Great Britain purchased land in Virginia in 1793; and he lived until 1818. By the treaty of 1794 between Great Britain and the United States, he was entitled to hold the land; and no proceeding having been instituted during the war of 1812 to escheat it, that war did not divest his rights, but the land descended, on his death, to his heirs. *Fiot & als. v. The Commonwealth*, 564

2. In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to a deed to the alien for the land as recorded in the county of K, an office copy of said deed is evidence for the heirs, though it was not recorded on proper proof. *Idem*, 564

AMENDMENTS.

1. A judgment by confession entered by mistake of the clerk, instead of a judgment by *nil dicit*, cannot be corrected at the next term of the court under either the 1st or 5th sections of ch. 181 of the Code, p. 680.

Richardson's ex'r & als. v. Jones, 53

2. In an action of debt, the common order is confirmed at rules irregularly; the defendant having pleaded to a part of the plaintiff's demand. The irregularity cannot be corrected at rules. *Southall's adm'r v. The Exchange Bank of Virginia*. 312

3. An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication, and reply; and if the plea filed at rules does not go to the plaintiff's whole demand, he may sign judgment for so much as is not covered by the plea. *Idem*, 312

APPELLATE COURT.

1. Plaintiff's demur to pleas, and the demurrer is sustained; but upon appeal the judgment is reversed. The cause will be sent back, with directions to permit the plaintiffs to withdraw their demurrer and reply, if

they shall ask leave so to do. *Hamttramck v. Selden, Withers & Co.* 28

2. A decree that a married woman shall convey her land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty will not bind her. Code, ch. 121, § 7, p. 514. *Clarke & als. v. Reins*, 98

3. Several instructions are given to the jury, in the last of which a fact is assumed which is properly for the determination of the jury. The previous instructions, however, had submitted that fact to the consideration of the jury, so that there could be no doubt on their minds as to the meaning of the court in the last instruction. The law having been correctly stated, the judgment will not be reversed. *Harvey & al. v. Eper*, 153

4. Where irregularities at rules are corrected in court, and the pleadings there made up, the defendant is entitled to a continuance of the cause as of right, if he demands it. But if instead of asking for a continuance, he asks that the cause may be sent back to rules, and excepts because his motion is overruled, the appellate court cannot reverse the judgment because the court required him to proceed to trial. *Southall's adm'r v. The Exchange Bank of Va.* 312

5. In reviewing the judgment of the court below in a case of murder or manslaughter, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict.

Vaiden's Case, 717

6. What should be done by the appellate court upon reversing an order of the County court on an application by a purchaser at a tax sale to have the survey. See *Tax Sales*, No. 4, and *Delaney v. Goddin*, 266

APPELLATE JURISDICTION.

1. There may be an appeal by the justice from an order of the Circuit court prohibiting his proceeding to try a party for the violation of a city ordinance.

Mayo, mayor, v. James, 17

2. An execution is for less than five hundred dollars, but it is levied on a

slave allotted to a widow at a valuation above that sum. She having obtained an injunction to the sale under the execution, which was afterwards dissolved. QUERE: If the Supreme court of appeals has jurisdiction.

Suoddy v. Haskins & als. 363

3. If an appeal from an interlocutory order or decree is allowed, and the Court of appeals is of opinion that the cause should have been proceeded in further before the appeal was allowed, it will be dismissed as improvidently awarded.

Hughes & wife v. Johnston, 479

4. In a bill to confirm the sale of infants' land, which is decreed in 1836; the cause is continued without any thing further being done until 1853; and then an appeal is taken from the decree of 1836. It was improvidently allowed, and should be dismissed. *Idem,* 479

ASSETS.

In favor of a judgment creditor of a deceased debtor, his real estate was not merely a secondary fund for the payment of debts, under the act of 5 George 2, ch. 7, § 4; but the real and personal estate was equally liable. *Nuckley's adm'r v. Rotchford & als.* 60

ASSIGNMENTS.

1. Under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable. The assignment will only be allowed to stand as a security for the true amount for which the legatee is liable.

Gaw v. Huffman, 628

2. The legacy not being payable until the termination of a life estate, and the legatee being very needy; on that ground too, the assignment will be held only as a security for the amount due from the legatee to the executor. *Idem,* 628

ATTACHMENTS.

1. W living in Virginia, determines to remove to another state; and in pursuance of that purpose, leaves the

place where he has resided, and proceeds directly to the place where he intends to reside. He is a nonresident of the state, in the sense of the attachment law, directly he commences his removal, and before he gets beyond the limits of the state.

Clark v. Ward & als. 440

2. The endorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate. *Idem,* 440

3. The attachment is served upon trustees in a deed of trust for the payment of certain debts, and among them are the debts due to the plaintiff in the attachment. There could, therefore, be no surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there can be no surplus in their hands liable to this attachment. *Idem,* 440

4. It seems that the statute in relation to attachments at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee.

Balt. & Ohio R. R. Co. v. Gallahue's adm'r, 655

5. QUERE: Whether the statute operates at law upon debts which, though contracted at the time of the service of the attachment upon the garnishee, are not then payable.

Idem, 655

6. The debt due from the garnishee being only payable upon a release under seal of all claims arising out of the contract in which the debt originated, there can be no judgment against the garnishee until the release is executed. *Balt. & Ohio R. R. Co. v. McCullough & Co.* 595

7. A corporation may be summoned and proceeded against as a garnishee, upon proceedings under the Code, ch. 151, § 2, p. 601. *Balt. & Ohio R. R. Co. v. Gallahue's adm'r,* 655

8. Where a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal. *Idem,* 655

9. The answer of the garnishee speaks of debts due from him to the defendant at the date of the service of the attachment; the verdict of the jury impaneled in the cause, speaks as to a later date. The verdict is no

reply to the answer, and should be set aside.
Idem, 655

10. The lien of a *fieri facias* issued and returned before the issue of an attachment, has priority over the attachment lien. *Puryear v. Taylor*, 401

AWARDS.

1. An order of reference is made in a pending action of ejectment, by the terms of which all matters in difference between the parties are submitted to the final arbitrament of the arbitrators chosen. But this order is made in pursuance of an agreement in writing under seal, between the same parties, to refer the single question of the value of the land in controversy: the defendant agreeing to give to the plaintiffs for the land, the price fixed upon it by the arbitrators. The order of reference is to be construed with reference to the agreement; and therefore the award, which only fixes the value of the land in controversy, is in conformity to the submission.

Clarke & als. v. Reins, 98

2. Certain legal questions are submitted by parties to a controversy to an arbitrator, and they agree to be bound by the award. Upon a suit being afterwards instituted by one of the parties against the other, in relation to the subject matter of the submission, the award of the arbitrator deciding the questions submitted to him, is the law of the case.

Lunsford v. Smith, 554

BAILMENT.

Contractors on a railroad hire slaves for a year to work on the road in the county of A. They take them to the adjoining county of C, and employ them on the road in that county; and whilst there they take sick and die. HELD:

1st. This removal of the slaves from the county of A to the county of C, is not of itself a conversion of the slaves to their own use by the contractors, whereby they became immediately liable to the owner for the value of the slaves in the event of their death, whether occasioned by such wrongful act or not.

Harvey & al. v. Epes, 153

2d. But if the death of the slaves was occasioned by the wrongful act of removing and working them in the county of C, then the said act, in connection with the death of the slaves, was a conversion of them by the contractors to their use, and made them liable for the value of the slaves, either in case or trover. And the slaves having died whilst they were employed in C, the burden of showing that their death was not occasioned thereby devolves upon the contractors.

Idem, 153

3d. Whether the removal of the slaves to the county of C was or was not a conversion, depending upon whether or not it occasioned their death, the implied waiver of the owner of the slaves, of the obligation by the contractors to work them in the county of A, cannot be inferred from facts which transpired before the death of the slaves.

Idem, 153

4th. The acceptance, by the owner of the slaves, of the hires up to the time of their death, having been after the institution of the action to recover their value, and whilst the said action was vigorously prosecuted, was not a waiver in law of the conversion.

Idem, 153

BALTIMORE & OHIO R. R. CO.

The Baltimore & Ohio R. R. Co. is a corporation of the state of Virginia; and although its principal office is in Maryland, and its principal officer resides there, it may be sued in Virginia on contracts made here.

Balt. & Ohio R. R. Co. v. Gallague's adm'rs, 655

BANKS.

1. A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.

Booker v. Young & als, 303

2. A board of directors of a bank consists of seven, and they are all present. Upon a vote for president but five vote, three of whom vote for Y, and two for B, who had been president the previous year. Under the belief that it required a majority of

the whole number to elect, they postpone the election; and B continues to act as president. At a subsequent meeting they proceed again to the election, when Y receives the three votes he had received before, and votes for himself, making a majority of the whole number; B receives two votes and he votes for S. Whereupon Y is declared to be duly elected; and he proceeds to act as president. Upon an application by B for a *mandamus* to restore him to the office. HELD: by two judges, that Y was duly elected the first day; and whether or not he accepted, B had no right to it after that time. One judge held that Y, not then having insisted on it, it was no election; but that he might vote for himself, and therefore was duly elected on the last day. And another judge held that the votes of both Y and B were to be held as nullities, under the act, Code, ch. 57, § 16, and therefore that Y received a majority of the legal votes cast on the last day, and was duly elected. *Idem*, 303

BILL OF REVIEW.

A party to a suit claiming to have purchased a part of the real estate of a testator at a sale for taxes, and to have received a conveyance therefor; but such purchase having been made before a decree directing the real estate to be sold at the suit of a creditor of the testator; he cannot set up his purchase by a bill to review the decree on that ground. *Suckley's adm'r v. Rotchford & als.* 60

BONDS.

1. By a bond dated the 27th of March 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March 1842, a certain sum of money with interest; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie; and it is not necessary to notice the provision as to the mode of payment in the declaration. *Butcher v. Carlile*. 520

2. See the opinion of MONCURE, J. for the distinctions in relation to such obligations. *Idem*, 520

CAVEATS.

A *caveat* is revived in the name of the executor of the *caveator*, who is directed to sell the land, and of the devisees of the proceeds of sale; and no objection is taken thereto until after the verdict. The executor being the proper party, the irregularity of joining the others with him will then be disregarded. *Caruthers & als. v. Eldridge's ex'or & als.* 670

CHARGE.

Testator says, "It is my will and desire that my just debts be paid out of my estate by my executors hereafter named." The debts are not thereby charged upon the real estate. *Gaw v. Huffman*, 628

CONDITIONS.

1. By contract between a railroad company and a contractor, he is not to receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands upon the company arising out of the contract. This is a valid agreement, and is a condition which must be complied with before the contractor can recover the money.

Balt. & Ohio R. R. Co. v. McCullough & Co. 595

2. Testator bequeaths slaves to trustees for the use of J for her life; and directs that at her death the slaves be emancipated. But should they or any of them prefer remaining in the state, they can do so by choosing masters to serve during the life of the person chosen; and then they are to have the option of freedom or slavery by making a second choice. The slaves are emancipated, and the condition is repugnant and void.

Osborne & als. v. Taylor's adm'r & als. 117

3. See *Ordinaries*, No. 6, 7, and *Nights v. Yarnalls*. 292

CONFLICT OF LAWS.

1. A statute requiring a license to keep a cook-shop, and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond passed in pursuance

of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city. *Mayo, mayor, v. James,* 17

2. A rule of practice prescribed by the Supreme court of the U. S. which is in conflict with an act of congress, is void. *Suckley's adm'r v. Rotchford & als.* 60

CONSTRUCTION—*Rules of.*

For rules for the construction of wills, see *Wills*, and

Wootton v. Redd's ex'or & als. 196

CONTINUANCE OF A CAUSE.

1. Irregularities at rules being corrected at the next term of the court, and the pleadings then made up, the defendant is entitled to a continuance of the cause as of right. *Southall's adm'r v. Exchange Bank of Va.* 312

2. Under what circumstances it is error to refuse a continuance of a cause. *Fiot & als. v. The Commonwealth,* 564

CONTRACTS.

1. An agreement is entered into in 1844 between T, a commission merchant in P, and Y, an inspector of tobacco at a ware-house in that city, by which T was to send all his tobacco to that ware-house, and Y was to endorse his note to an amount not exceeding ten thousand dollars. At the same time three of the owners of the ware-house agree with Y, that they will each bear a certain proportion of any loss he may sustain by his endorsement for T. This agreement with T is acted on until October 1847, when Y was removed from his place as inspector, and soon thereafter T, with the assent of Y, ceased to send his tobacco to that ware-house. At this time Y is first endorser on a note of T, and two of the owners of the ware-house are also endorsers on the note. It is afterwards renewed with Y still as first endorser, and with two other endorsers, they being inspectors at another ware-house where T was about to send his tobacco. In May 1848 T fails, and Y is compelled to pay the note. Y is entitled to recover from each of the owners of the

ware-house who contracted with him, his proportion of the note which he had agreed to pay. *Young v. Threatt & als.* 1

2. The contract between a railroad company and one of the contractors on its line of improvement, provides that the contractor shall not receive the amount of the final estimate of his work until he shall release, under seal, all claims or demands against the company arising out of the contract. The contractor cannot recover the amount of the final estimate until he has executed the release: And his attaching creditor at law has no greater rights against the company in relation to the final estimate, than he has; and therefore cannot recover the amount unless the contractor has executed the release.

Balt. and Ohio R. R. Co. v. McCullough & Co. 595

3. See *Equitable Mortgages*, and *Rufniers v. Putney & als.* 541

CONTRIBUTION.

How devisees and legatees shall contribute to payment of debts of testator. See *Executors & Administrators*, No. 6, 7, 8, and *Gair v. Huffman,* 628

CONVERSION.

See *Bailments*.

CONVEYANCES—*Fraudulent.*

1. The act, Code, ch. 149, § 13, p. 593, limiting the period in which suits may be brought to set aside conveyances or transfers of property on considerations not deemed valuable in law, does not apply to cases of actual fraud.

Shoddy v. Haskins, & als. 363

2. H a merchant conveys to L all his stock of goods and the store-house for the current year, in trust to pay certain debts described in the deed: And the deed provides that H shall keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store until default in the payment of any of the debts secured, and until the trustee shall be requested by any of the said creditors to close the deed by a sale.

The deed is fraudulent *per se* and void as to the creditors of H.

Addington v. Etheridge, coroner, 436

3. A deed is made conveying personal property to trustees for the purpose of paying debts specified therein: and the trustees take possession of the property and proceed to sell it for the purposes of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, there was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.

Clark v. Ward & als. 440

CORPORATIONS.

1. When the word person is used in a statute, corporations as well as natural persons are included for civil purposes.

Balt. & Ohio R. R. Co. v. Gallahue's adm'rs, 655

2. A corporation may be summoned and proceeded against the garnishee, upon proceedings under the Code, ch. 151, § 2, p. 601. *Idem,* 655

3. Where a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal. *Idem,* 655

4. The Baltimore and Ohio railroad company is a Virginia corporation, and may be sued as such in Virginia, upon contracts made here. *Idem,* 655

COSTS.

In a suit for specific execution of a contract by a vendor of land, the title being defective when the suit was brought, though there is a decree for plaintiff, defendant is entitled to his costs. *Peers v. Barnett & others,* 410

COUNTY COURTS.

See *Courts.*

COURTS.

1. The County court, in passing upon any question under the act, Code, ch. 37, § 15, is invested with no judicial power, but acts in a capacity

purely ministerial: And in determining whether or not it will order a report of the surveyor therein required to be recorded, is restricted to the consideration of objections to the report: and has no right to look beyond the return of the list of sales by the sheriff required by § 11 of said chapter.

Delaney v. Goddin, 266

2. In such a case, upon a motion by the purchaser to order the report of the surveyor to be recorded, the County court, not acting judicially, has no authority to render a judgment overruling the motion with costs.

Idem, 266

3. If the County court renders such a judgment, upon appeal to the Circuit court, that court should simply reverse the judgment with costs; but should not proceed to order that the report of the surveyor should be recorded: The error of the County court can only be corrected by *mandamus*, and not by writ of error or *supercedens*.

Idem, 266

4. As to the correction of irregularities at rules. See *Practice at Common Law*, No. 5, 6, and

Southall's adm'r v. Exchange Bank of Va. 312

5. If a County court commits an estate to a sheriff for administration, before the expiration of three months from the death of the testator or intestate, the act is not void but voidable.

Hutcheson, sheriff, adm'r, &c. v. Priddy, 85

6. An estate having been committed to the sheriff, the County court cannot grant the administration to a distributee, without notice to the sheriff of the application.

Idem, 85

7. It is not imperative on the County court to grant administration to a distributee after the estate has been committed to the sheriff; but there is a legal discretion in the court.

Idem, 85

CREDITOR AND DEBTOR.

1. In favor of a judgment creditor of a deceased debtor, his real estate was not merely a secondary fund for the payment of the debts under the act of 5 George 2, ch. 7, § 4, but the real and personal estate was equally liable.

Suckley's adm'r v. Rotchford & als, 60

2. A judgment creditor might file a bill in equity against the executor and devisees to subject the real and personal estate to the payment of his debt. *Idem.* 60
3. A judgment creditor was not bound to pursue debtors of his debtor out of the district of Columbia, when the act of 5 George 2 was the law, before proceeding to subject the real estate. *Idem.* 60
4. When profits of a husband's labor, though professing to act as agent for his wife, liable to his creditors. See *Husband & Wife*, No. 2, and *Penn v. Whiteheads*, 74
5. When deed of trust, though not properly recorded, good against creditors. See *Conveyances—Fraudulent*, No. 3 and *Clark v. Ward & als.* 440
6. Creditor may claim against a deed; and if he fails, may nevertheless claim under it. *Idem.* 440
7. What laches in pursuing a surviving partner, will deprive a creditor of his right to subject the estate of his deceased partner. See *Partners*, No. 2, 3, 4, 5, and *Jackson's adm'r v. King's adm'r & als.* 499
8. See *Fraud*, No. 1, 2, and *Winston v. Starke & als.* 317

CRIMES AND PUNISHMENTS.

1. It is not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro. *Mayo, mayor, v. James*, 17
2. On a trial for murder, the necessity relied on to justify the killing must not have arisen out of the prisoner's own misconduct. *Vaiden's Case*, 717

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. On a trial for a felony, a member of a grand jury which found the indictment against the prisoner, is not a competent juror to try him. *Dilworth's Case*, 689

2. If the prisoner does not know or might not, with due diligence, have known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objec-

tion if made before any of the evidence is introduced. *Idem.* 689

3. *Quære*: If he may not make the objection at any time before the verdict is rendered. *Idem.* 689

4. *Quære*: If upon such objection being made to a juror, it is proper to examine him upon his *voire dire* as to the circumstances, and the state of his mind and feelings towards the prisoner. *Idem.* 689

5. The act, Code, ch. 162, § 4 p. 628, only relates to those disabilities created by our statutes; and do not refer to other causes of challenge which exist at common law, and as to which the statutes are silent. *Idem.* 689

6. In reviewing the judgment of the court below in a case of felony, the appellate court will not reverse the judgment on the ground that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict. *Vaiden's Case*, 717

7. Bill of exceptions to the refusal of the court to grant a new trial in a criminal case, must state the facts proved, not the evidence. *Idem.* 717

CROSS BILL.

When it may be filed. See *Parties*, No. 3, and *W. & C. Tarr v. Hendricks' ex'or*, 642

DEBT.

By a bond dated the 27th of March 1840, the obligee bound himself to pay to the obligee or order, on or before the 25th of March 1842, a certain sum of money with interest, "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie: and it is not necessary to notice the provision as to the mode of payment in the declaration.

Butcher v. Carlile, 520

DECLARATIONS.

1. When declarations or statements not evidence. See *Evidence*, No. 6, 8, *Wills*, No. 3, and *Unis & als. v. Charlton's adm'r & als.* 484

Balt. & Ohio R. R. Co. v. Galla-hue's adm'rs, 655

Woolton v. Reed's ex'or & als. 196

2. When declarations evidence. See *Evidence*, No. 10, and
Lunsford v. Smith, 554

DECREES.

When appeal from interlocutory decree will be dismissed as improvidently allowed. See *Appellate Jurisdiction*, No. 3, and

Hughes & wife v. Johnston, 479

DEEDS.

1. A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title to show the bounds of the land claimed by him and the extent of his possession. *Olinger v. Shepherd*, 462

2. When copy of deed, though not properly recorded, may be evidence. See *Aliens*, No. 2, and

Fiot & als. v. The Commonwealth, 564

3. An ancient deed may be introduced as evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine. *Curthers & al. v. Eldridge's ex'or and als.* 670

DELINQUENT AND FORFEITED LAND.

H is the owner of a tract of land in 1797. Two papers purporting to be deeds bearing date in that year, one from H to G and the other from G to M, conveying this land, are by the proper court directed to be recorded, and are recorded, though they are not duly authenticated. M enters the land as his own on the books of the commissioner of the revenue; and in 1815 it is sold as the land of M, as having been forfeited for nonpayment of taxes, and conveyed by the sheriff to B, who enters it on the commissioner's books; and it has been ever since held by B and those claiming under him; and all the taxes charged thereon have been paid or released. In 1843 a patent is obtained

for the land by L, who enters it with the commissioner, and pays the taxes thereon regularly. HELD: That under the circumstances, the title of the parties claiming under B is valid; and the land was not forfeited under the act of 1835, as the land of H, so as to enure to the benefit of the junior patentee.

Lohrs v. Miller's lessee, 452

DEPOSITIONS.

1. A deposition is taken in another state, by a plaintiff in an action depending in Virginia, and the justices certify that the defendants appeared by counsel and cross-examined the witness: And the deposition shows that counsel professing to represent the defendants, did appear and cross-examine the witness. It does not appear, however, that the deposition was taken under a commission, or that the court had ever authorized a commission to issue; nor was any notice to the defendants produced or proved. The deposition was taken without authority; and the justices having no authority to take the deposition, their certificate is no proof of the facts it states. *Unis & als. v. Charlton's adm'r & als.* 484

2. A deposition taken without authority or notice is not admissible as evidence; and the objection to it may be taken when it is offered to be read as evidence to the jury. *Idem*, 484

3. A deposition taken at so late a day that the other party cannot attend at the time and place of taking it and then get to court where the cause in which it is taken is to be tried, by the commencement of the term, is not admissible in evidence. *Idem*, 484

4. A notice given at 8 P. M. to take a deposition between 8 and 9 A. M. of the next day, in the city where both the parties and their counsel reside, would generally be a reasonable notice. And such notice given directly the plaintiff learned the witness would leave for a distant state on the next day at 3 P. M. and would not return again, is sufficient, though a court is in session in the city at the time, and though the defendant, who is an attorney, and his counsel, had been occupied as counsel in a cause

on the day of the notice, and were to be and were so occupied on the next day, so that they could not attend to the taking of the deposition. *McGinnis v. Washington Hull Association*, 602

DEVISEES.

In what proportion devisees are to be charged with debts of their testator binding the heirs, which have been paid by the executor. See *Executors and Administrators*, No. 5, 6, 7, and *Gau v. Huffman*, 628

DISTRIBUTABLE SURPLUS.

1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed. *Knight & wife v. Oliver & als.* 33

2. The slaves allotted to the widow are not a part of the distributable surplus to be divided among the children at the death of the intestate. *Idem*, 33

3. See *Advancements*, No. 4, and *Idem*, 33

DISTRIBUTEES.

See *Advancements*.

EJECTMENT.

For distinction between ejectment and forcible entry and detainer, see Judge MONCURE's opinion in

Olinger v. Shepherd, 462

ELECTIONS.

1. A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.

Booker v. Young & als. 303

2. See *Banks*, No. 2, and *Idem*, 303

EMANCIPATION.

See *Slaves*, No. 2, 6, 8, and

Osborne & als. v. Taylor's adm'r & als. 117

Wood v. Humphreys, 333

Taylor v. Cullins, 394

EQUITABLE JURISDICTION AND RELIEF.

1. Administrator with the will annexed having in his possession slaves of his testator, and being in doubt whether they are emancipated by the will, may come into equity, making the legatees and next of kin of the testator parties, and ask the court to construe the will. And in this suit the court being of opinion that the slaves are emancipated by the will, may decree in their favor, and direct that they be freed. *Osborne & als. v. Taylor's adm'r & als.* 117

2. Equity will interfere to prevent the building a dike along a stream by the proprietor of the land on one side of the stream, which would have the effect to destroy an old dike on the other side, and injure the land of the proprietor on that side.

Burwell v. Hobson, 322

3. A court of equity will not decree a sale of land for payment of the purchase money whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale. *Peers v. Barnett & als.* 410

4. In such case, as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs. *Idem*, 410

5. How title may be perfected by lapse of time pending the suit.

See *Vendors and Purchasers*, No. 4, and *Idem*, 410

6. A creditor plaintiff in an attachment suit in chancery, states in his bill and proves, that his debtor had assigned to him certain railroad stocks and a bond secured by a deed of trust, as a security for one of his debts; and seeks to attach the effects in the hands of trustees in a deed of trust for payment of debts, including plaintiff's. Though there are no effects in the hands of the trustees subject to the attachment, and they disclaim any right to or possession of the stocks and bond assigned to the plaintiff, they are interested for the creditors to see that the fund assigned to the plaintiff is properly applied to the satisfaction of his debt; and therefore the bill should not be dismissed as to them; but the court should proceed to have the assigned property

properly disposed of and applied; and to give the plaintiff relief according to his rights under the deed.

Clarke v. Ward & als. 440

7. See *Husband & Wife*, No. 3, 4, 5, 6, 7, and *Penn v. Whiteheads*, 74 *Clarke & als. v. Reins*, 98

EQUITABLE MORTGAGES.

1. A husband conveys a tract of land, one part of which is his own, and the other part is his wife's maiden land, in trust to secure a debt. Afterwards the husband and wife unite in a conveyance of the land to a third person, upon the consideration of five hundred dollars, and that the grantee will pay the debt, to secure which the land had been conveyed by the husband. The creditor has an equitable lien upon the land under this last deed, which is good against all parties claiming under the grantee: And if the five hundred dollars has not been paid, it will be postponed to the creditor's lien. *William & Mary College v. Powell & als.* 372

2. A case in which, by contract between a father and two of his children, an equitable mortgage for payment of certain debts of a son in law, is created upon any estate which the son in law or his wife may derive by devise or descent from her father.

Ruffner v. Putney, 541

3. How the accounts of the equitable mortgage in possession are to be settled. *Idem*, 541

4. QUERE: Whether mortgagee in possession entitled, under the circumstances, to compensation for managing the property. *Idem*, 541

ESCHEATS.

See *Aliens*.

ESTATES.

See *Limitation of Estates*.

ESTOPPEL.

1. Upon appeal, the Court of appeals, with all the parties before it, held that a bond was valid, though executed after the time prescribed in a private act of assembly. That judgment concludes the question, though

the decree of the court below was reversed because the proceeding was by petition, instead of by bill.

Corbell's ex'or v. Zuluff & als. 226

2. A copy of a will purporting to be certified by a former clerk, is admitted to record under the act of February 19th, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and it is not admissible to prove that the person who certified the copy was not the person whose name is signed to the certificate. *Taliaferro & als. v. Pryor*, 277

EVIDENCE.

1. What evidence is proper to aid in the construction of wills. See *Wills*, No. 2, and

Woolten v. Redd's ex'or & als. 196

2. What evidence not proper in such a case. See *Wills*, No. 3, and

Idem, 196

3. In ejectment, it being proved that an ancestor of the plaintiff lived upon the land, evidence that he was generally considered the owner, or that the witness considered him the owner of it, is incompetent and inadmissible.

Taliaferro & als. v. Pryor, 277

4. A copy of a will purporting to be certified by a former clerk, is admitted to record under the act of February 19th, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate, but by another person who was not authorized to make the certificate, is inadmissible in a collateral action.

Idem, 277

5. When record not evidence. See *Trusts and Trustees*, No. 2, and

Winston v. Starke & als. 317

6. In a suit by persons held as slaves, for their freedom, on the ground that their ancestress had been brought into the state without the oath then required by the statute having been taken by her master, her declarations that she was free in the state from whence she was brought,

and request to the witness to write to that state to get information on the subject, it not appearing that such declaration or request was made within twenty years after she was brought into the state, are not competent evidence to rebut the presumption arising from lapse of time, that the oath was taken by the master.

Unis & als. v. Charlton's adm'r & als. 484

7. Nor in such case is it competent to prove the character of the master holding her in the state, to account for her failure to assert her freedom.

Idem, 484

8. The statements of a division engineer of a railroad company as to the indebtedness of the company to a defendant in an attachment, where the railroad company was summoned as a garnishee, are not evidence against the company; it not appearing that he was the agent the company having any authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to, so as to make his statements a part of the transaction, and explaining the nature thereof. *Balt. & Ohio R. R. Co. v. Gallahue's adm'r,* 655

9. Testimony in relation to the correctness of a copy of a paper is not admissible, unless the absence of the original paper is accounted for.

Lunsford v. Smith, 554

10. To prove the authority of an agent, the parol declarations of the principal to him may be given in evidence.

Idem, 554

11. In four suits for freedom all the plaintiffs claim their freedom under one ancestress, and all the defendants claim under C, whose administrator is a defendant in one of the cases, and who plaintiffs insist purchased their ancestress from S, with general warranty of title; the cases are tried together, and it is agreed by counsel that the depositions taken in one case shall be read in all. The defendants offer the deposition of S, and with it offer a release from the administrator of C to S of all right of recovery upon the warranty. The release of the administrator is sufficient to restore the competency of S; and if it does not apply to all the plaintiffs in the other

actions, still under the agreement of counsel the deposition is admissible as evidence on the trial. *Unis & als. v. Charlton's adm'r & als.* 484

12. The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility, by the proof of statements made by him at another time inconsistent with and contradictory of the statement in his deposition, before the foundation is first laid by an examination of the witness touching the fact of his having made such statement. *Idem,* 484

13. A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title, to show the bounds of the land claimed by him, and the extent of his possession. *Olinger v. Shepherd,* 462

14. In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to the alien's deed for the land as recorded in the county of K, an office copy of said deed is evidence for the heirs, though it is not recorded upon proper proof.

Fiot & als. v. The Commonwealth, 564

15. An ancient deed may be introduced as evidence without proof of its execution, though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. *Caruthers & al. v. Eldridge's ex'or & als.* 670

16. Husband is not a competent witness after the death of his wife, to prove the consideration upon which he made a post nuptial settlement upon her. *William & Mary College v. Powell & als.* 372

17. See *Deposition.*

EXCEPTIONS—*Bill of*

1. In an action at law the parties waive a trial by jury, and submit the whole matter of law and fact to the judgment of the court, under the act, Code, ch. 163, § 9, p. 629. An exception taken to the judgment of the court must state the facts proved, not

the evidence: And it will be treated as governed by the principles applicable to exceptions taken to the opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence. *Pryor v. Kuhn*, 615

2. A bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial on the ground that the verdict is contrary to the evidence, is to be framed in the same manner as the bill of exceptions in civil cases; to the like refusal is framed. And if the evidence is certified instead of the facts proved, the appellate court will only look to the evidence introduced by the commonwealth. *Vaiden's Case*, 717

EXECUTIONS.

1. A *fieri facias* is a lien from the time it goes into the hands of the officer to be executed, upon all the personal estate of the debtor, including debts due to him, with the exception stated in the statute; and this lien continues after the return day of the execution, and only ceases when the right to levy the execution or to levy a new execution upon the judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process. See Code, ch. 188, § 3 and 4, p. 717. *Puryear v. Taylor*, 401

2. The lien of a *fieri facias* of prior date has priority over a subsequent attachment. *Idem*, 401

3. Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and day from the dissolution of the injunction, without a *scire facias*, though the injunction was in force more than ten years. *Hutsonpiller's adm'r v. Storer's adm'r*, 579

EXECUTORS AND ADMINISTRATORS.

1. A private act of assembly empowers the County court to authorize G, administrator of Z, to sell and convey land, on such terms as the court should prescribe. Upon the construction of the statute, held, that G acted as administrator in the sale of the land. *Corbell's ex'or v. Zeluff & als.* 226

2. The administrator having sold and conveyed the land and collected a part of the purchase money, held, under the construction of the statute and the order of the County court, the purchaser was justified in paying to the administrator, and therefore as between their respective sureties, the sureties of the administrator were liable. *Idem*, 226

3. Executor having exhausted the personal in payment of debts, and being largely in advance to the estate for the payment of debts which bound the heirs, is entitled to stand in the place of the creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the time of the death of the testator.

Gav v. Huffman, 628

4. A life estate in land having been given to the widow in lieu of dower, and being of less value than her dower would have been, her life estate is not to bear any part of the burden of paying the debts.

Idem, 628

5. The remainder after the death of the widow in the land devised to her for life, having been given to some of the devisees, their proportion of the debts is according to the value of their interest at the death of the testator. *Idem*, 628

6. The shares of some of the devisees in said remainder are charged with the payment of certain legacies. The present value of the legacies at the death of the testator is also to be deducted from such present value of the remainder; and the proportion of the debts is according to the value of the remainder so ascertained. *Idem*, 628

7. The legacies charge upon the remainder in the land are to bear a proportion of the debts according to their value at the death of the testator. *Idem*, 628

8. The sum which at compound interest will produce the amount of the legacy at the death of the widow, is the present value: And the widow being dead, the period of her death is the time for the payment of the legacy. *Idem*, 628

9. Advancements made by the testator in his lifetime are not to be taken into the account in fixing the proportion of the debts which the devisee is to pay. *Idem*, 628

10. As to contracts between executor and legatee, see *Legacies & Legatees*, No. 1, 2, and *Idem*, 628

11. When a release of a warranty by an administrator is sufficient. See *Evidence*, No. 11, and *Unis & als. v. Charlton's adm'r & als.* 484

EXPECTANT INTERESTS.

See *Legacies & Legatees*, No. 2, and *Gaw v. Huffman*, 628

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. In a case of forcible entry and detainer pending when the Code of 1849 went into operation, the subsequent proceedings may conform to the provisions of the Code. *Olinger v. Shepherd*, 462

2. It seems that under the Code of 1849 a separate complaint is not necessary in a proceeding for an unlawful detainer; that the only complaint necessary is that embodied in the summons. *Idem*, 462

3. The distinction between the action of ejectment and a proceeding of forcible entry, stated by *MONCURE, J.* *Idem*, 462

4. In a proceeding for an unlawful entry and detainer, if the defendant has entered unlawfully, the plaintiff is entitled to recover without any regard to the question of his right of possession: And this though the land from which he is ousted is the land of the commonwealth, or of the party who ousted him. *Idem*, 462

FORFEITURES.

See *Delinquent and Forfeited Land.*

FRAUD.

In a suit between S, trustee in a deed for the wife of the grantor, and B, a creditor of the grantor, the deed is held to be fraudulent to the extent of one thousand four hundred and eighty-three dollars, much more than sufficient to pay B's debt. W, an-

other judgment creditor of the grantor, files a bill, in which he states his debt and the decree in the former suit, and asks that S may be decreed to pay plaintiff's debt out of the balance remaining in his hands for which the deed was declared fraudulent: And he files a copy of the record in the first suit. S answers, denying that the deed is fraudulent, and objecting to the record of the former suit as evidence. *HELD:*

1st. If the bill is to be considered as charging fraud in the deed, the answer puts that fact in issue; and the plaintiff not having been a party to the first suit, the record is not competent evidence. *Winston v. Starke & als.* 317

2d. The bill does not charge fraud in the deed, but relies on the first suit as a proceeding of which plaintiff is entitled to the benefit. The case does not come within the principles upon which proceedings *in rem* are held to bind all the world. *Idem*, 317

3d. When deed fraudulent *per se*. See *Conveyances—Fraudulent*, No. 2, and *Addington v. Etheridge, coroner*, 436

4. See *Husband & Wife*, No. 2, and *Penn v. Whiteheads*, 74

FREE NEGROES.

I. It is not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro.

Mayo, mayor, v. James, 17

2. A statute requiring a license to keep a cook-shop and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city. *Idem*, 17

See Attachments, No. 4, 5, 7, 8, 9, and *Balt. & Ohio R. R. Co. v. Gallahue's adm'rs*, 655

GARNISHEES.

See Attachments, No. 4, 5, 7, 8, 9, and *Balt. & Ohio R. R. Co. v. Gallahue's adm'rs*, 655

GUARDIAN AND WARD.

1. Upon the coming of age or marriage of a ward, or the death of the guardian, the guardianship termi-

nates; and from that time only simple interest is to be charged on any balance then in his hands, or which he afterwards received.

Armstrong's heirs v. Walkup, 608

2. The estate of the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian. But from the termination of the guardianship the same is to be accounted for on the ordinary principle governing accounts between creditor and debtor.

Idem, 608

3. A guardian is not to be charged upon the money received by him from the day it is received; but he is to be allowed six months in which to invest it.

Idem, 608

4. A guardian retains his female wards in his family, and treats them as his children, but they are required to work as children might be; though the condition of his family did not require their services. The guardian is to be allowed a reasonable compensation for their board and clothing, and he is not to be charged for their services.

Idem, 608

HOTCHPOT.

See *Advancements*.

HUSBAND AND WIFE.

1. Advancements to children are not brought into hotchpot for the benefit of the widow: She is only entitled to share in the estate of the intestate of which he died possessed.

Knight & wife v. Oliver & als. 33

2. A husband carries on a mercantile business as agent for his wife, and he is aided by his sons who are minors. The business is profitable, and property is accumulated from its profits. The husband has an interest in this property which may be subjected by his creditors to the payment of his debts.

Penn v. Whiteheads, 74

3. Upon a bill by a decree creditor of the husband, to subject the property, charging that the agency was a fraud, and that the property was

the husband's, or at least that he had an interest in it on account of his and his sons' services, and asking for an injunction to restrain the collection of the debts and the disposition of the property and for a receiver; the injunction is properly granted: And upon a motion in vacation to dissolve the injunction, which was overruled, it was proper to appoint a receiver to sell the property and collect the debts.

Idem, 74

4. One of the sons having come of age was taken in as a partner; and there were debts due for goods purchased for which the son was liable. If these debts were to be first paid out of the property, it was still error to direct the receiver to pay them before having a report upon them by a commissioner of the court.

Idem, 74

5. A court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract.

Clarke & als. v. Reins, 98

6. Nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land.

Idem, 98

7. A decree that a married woman shall convey her land with general warranty, though erroneous, is no cause for reversing the decree, as under the statute the warranty will not bind her.

Code, ch. 121, § 7, p. 514.

Idem, 98

8. Widow is a necessary party to a suit for partition of land by the heirs.

Curtis v. Swad & als. 260

9. Though a post nuptial settlement by a husband on his wife is declared fraudulent as to his creditors at the suit of one creditor, this cannot be relied on by another creditor in another suit; but he must charge the fraud and prove it.

Winston v. Starke & als. 317

10. A widow having received her distributable share of the personal estate of her husband, is not a purchaser for value, so as to be entitled to set up the defense of purchaser for value without notice.

Snoddy v. Haskins & als. 363

11. In such case the husband having obtained slaves by a conveyance fraudulent as to creditors of the gran-

tor, and one of these slaves having been allotted to the widow, the slave in her possession may be taken in execution at the suit of a creditor of the grantor, though the husband and those claiming under him have been in possession more than five years.

Idem, 363

12. Husband is not a competent witness after the death of his wife, to prove the consideration upon which he made a post nuptial settlement upon her. *William & Mary College v. Powell & als.* 372

13. Such a settlement is made which recites that the consideration in part, is the agreement by the wife to unite in a conveyance of land a part of which is her own, and in another part of which she has a right of dower, for the purpose of paying a debt of her husband; and she does afterwards unite in the conveyance. The deeds themselves are proofs of the consideration, and the settlement will be sustained to the extent of the value of the interest she conveyed.

Idem. 372

14. See *Equitable Mortgagors*, No. 1, and *Idem,* 372

15. Testatrix bequeaths slaves to A, B and C jointly, upon the following trust: To be held by them in trust for the benefit of her daughter E (a married woman) or her heirs. And as it is my wish to guard in the most ample manner, against the imprudent sale or other disposition of the aforesaid property, during the natural life of E, it is hereby wholly and solely confided to the discretion of the aforesaid trustees A, B and C, in what manner the said E shall receive and enjoy the profits arising from the hires or other disposition of the slaves aforesaid. And in the event of the death of E without heirs of her body, then all the slaves and their increase to B. HELD:

1st. E took an absolute estate in the slaves, and the bequest over is void.

2d. That it is a bequest to the separate use of E.

3d. That separately or jointly with her husband, E had no power to alienate the slaves during her cōverture.

4th. That the trustees may permit E and her husband to take possession

of the slaves, and thus enjoy the profits of them.

5th. Two of the trustees having died since the death of the testatrix, the legal title survived to the third; and he may maintain an action to recover one of the slaves which had been sold by a son in law of E with her consent.

Nixon v. Rose, trustee, 425

16. A life estate in lands having been devised to a widow in lieu of dower, and being of less value than her dower would have been, her life estate is not to bear any part of the burden of paying the debts of the testator.

Gaw v. Huffman, 628

INFANTS.

1. In a bill to confirm a sale of infants' lands, and a decree in 1836, nothing further is done in the cause until 1853. The proceedings on their face were irregular, the bill not having been sworn to, and it not appearing that the testimony was taken in the presence of the guardian *ad litem*, or on interrogatories agreed to by him. There should not be an appeal by the infant after coming of age from the decree of 1836; but plaintiff should be allowed to amend his bill and make the purchaser a party; to make the affidavit required by the statute; and prove, if he can, that the testimony was properly taken; and both parties should be allowed to take further evidence. And if upon taking the proper accounts, and the evidence introduced, it shall appear that the sale was necessary under the facts existing at the time, and was fairly made and for a full price, the same should not be set aside on account of irregularities in the proceedings.

Hughes & wife v. Johnston, 479

2. As to the mode of making partition of lands where infants' are parties, see *Partition*, No. 1, 2, and *Curtis v. Snead & als.* 260

INSTRUCTIONS.

1. Several instructions are given to the jury, in the last of which a fact is assumed which is properly for the determination of the jury. The previous instructions, however, had sub-

mitted that fact to the consideration of the jury, so that there could be no doubt in their minds as to the meaning of the court in the last instruction. The law having been correctly stated, the judgment will not be reversed. *Harvey & al. v. Epes*, 153

2. Parol evidence having been introduced on a trial, some of which is legal and other parts illegal, it would be improper for the court to instruct the jury, in general terms to disregard all parol evidence tending to alter, vary, explain or to add to the written contracts between the parties introduced in evidence. Nor is the court bound to point out to the jury such of the evidence as would thus affect the contract; but this is to be done by the party asking for the instruction.

Idem, 153

3. In a case of probat, where the question was whether the paper was executed according to the statute, a motion to instruct the jury assumes all the facts stated by the subscribing witnesses as true, and asks the court to instruct the jury that the paper is not proved to be the will of the person making it, according to the statute. This instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them; and therefore it is not objectionable.

Green & als. v. Crain & als. 252

4. Upon a *scire facias* to revive a judgment which has been suspended by an injunction for forty-six years, issue was made up on the plea of payment; and upon the trial the court instructed the jury that the pendency of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending. This instruction was proper; and it was unnecessary to distinguish to the jury between the legal presumption and the natural presumption arising from lapse of time.

*Hutsonpiller's adm'r v. Stover's
adm'r*, 579

INTEREST.

How interest is to be charged against a guardian. See *Guardian and Ward*, No. 1, 2, 3, and

Armstrong's heirs v. Walkup, 608

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JUDGMENTS.

1. An entry "that the defendant relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of," &c. "and judgment accordingly," is a judgment by confession, and releases all previous errors in the proceedings in the cause.

Richardson's ex'x & al. v. Jones, 53

2. A judgment by confession entered by mistake of the clerk, instead of by *nil dicet*, cannot be corrected at the next term of the court under either the 1st or 5th section of ch. 181 of the Code, p. 680. *Idem*, 53

3. In an action of debt against two, one dies, and the suit is revived against his executrix; and then she and the other defendant give separate confessions of judgment, and a separate judgment is entered against each. This is not error. *Idem*, 53

4. As to the rights of judgment creditor in Alexandria county, see *Creditor & Debtor*, No. 1, 2, 3, and *Suckley's adm'r v. Rotchford & als.* 60

5. When execution may issue upon a judgment upon dissolution of an injunction to it. See *Execution*, No. 3, and

*Hutsonpiller's adm'r v. Stover's
adm'r*, 579

6. The statute of limitations to judgments does not run whilst an injunction to the judgment is pending.

Idem, 579

7. If a defendant in a judgment dies whilst an injunction to the judgment is pending, though the injunction may not be dissolved for more than five years after his death, the statute requiring judgments to be revived within five years, does not run pending the injunction; and the judgment may be revived after the five years from the death of the defendant. And this though the judgment might have been revived pending the injunction. *Idem*, 579

8. The act, Code, ch. 186, § 13, p. 710, which directs that the time for which the right to sue out execution on a judgment is suspended by the terms thereof or by legal process, shall be omitted in computing the limitation, applies to judgments recovered previous to the act, which were suspended by injunction at the

time when that act went into operation.

9. See *Instructions*, No. 4, and

Idem, 579

JURORS.

1. On a trial for a felony, a member of the grand jury which found the indictment against the plaintiff, is not a competent juror.

Dilworth's Case, 689

2. When the objection to the juror may be taken. See *Criminal Jurisdiction and Proceedings*, No. 2, 3, 4, 5, and

Idem, 689

JUSTICES.

Justices take a deposition without authority; their certificate is not evidence of the facts it states. *Unis & als. v. Charlton's adm'r & als.* 484

LACHES AND LAPSE OF TIME.

1. As to what laches will deprive a creditor of relief against the estate of a deceased partner, see *Partners*, No. 2, 3, 4, 5, and

Jackson's adm'r v. King's adm'r & als. 499

2. When lapse of time will cure defects in title to real estate. See *Vendor and Purchaser*, No. 4, and

Peers v. Barnett & others, 410

3. See the distinction between the legal presumption and the natural presumption from lapse of time. *Hutson's adm'r v. Stover's adm'r*, 579

LEGACIES AND LEGATEES.

1. Under a mutual mistake as to the proportion of the debts of the testator which a legatee was bound to pay to the executor, the legatee assigned the legacy to the executor for the payment of the amount for which she was supposed to be liable. The assignment will only be allowed to stand as a security for the true amount for which the legatee is liable.

Gaw v. Huffman, 628

2. The legacy not being payable until the termination of a life estate, and the legatee being very needy; on that ground also, the assignment will be allowed only as a security for the amount due from the legatee to the executor.

Idem, 628

3. Legacies charged upon land which is liable for debts of the testator binding the heirs, are to bear a proportion of the debts according to the relative value of the subjects.

Idem, 628

4. The legacies being payable at the death of a life tenant of the land, and the remainder in the land being only liable for the legacies and for the debts, the value of the legacies and the remainder in the land at the death of the testator is to be ascertained, and the debts are to be apportioned upon that value. *Idem*, 628

5. The sum which at compound interest will produce the amount of the legacy at the death of the life tenant, is the present value of the legacy.

Idem, 628

LICENSES.

See *Ordinaries, passim*.

LIEN.

1. For the lien of an execution, see *Executions*, No. 1, 2, and

Puryear v. Taylor, 401

2. As to what debts due from the garnishee an attachment at law operates upon, see *Attachments*, No. 4, 5, and *Balt. & Ohio R. R. Co. v. Gallahue's adm'r*, 655

LIMITATION—*Of Estates*.

1. Testator gives his estate to his wife during her life; and at her death it is to be equally divided amongst all his children. "And the shares of his two daughters M and B are to be held by them during their natural lives, and no longer, and then equally divided between their heirs lawfully begotten." And at his wife's death his lands to be sold and the proceeds divided as aforesaid. The words "heirs lawfully begotten," are words of limitation; and M and B took the whole interest in their shares of the estate. *Moore & als. v. Brooks*, 135

2. See *Husband and Wife*, No. 15, and *Niron v. Rose, trustee*, 425

LIMITATION—*Statute of*.

1. The act, Code, ch. 149, § 13, p. 593, limiting the period in which suits

may be brought to set aside conveyances or transfers of property on considerations not deemed valuable in law, does not apply to cases of actual fraud. *Snoddy v. Haskins & als.* 363

2. See *Husband and Wife*, No. 11, and
Idem, 363

3. The statute of limitations to judgments does not run whilst an injunction to the judgment is pending.

*Hutsonpiller's adm'r v. Stover's
adm'r,* 579

4. The statute which requires a judgment to be revived within five years after the death of the defendant, does not apply to a case in which the judgment was enjoined for the whole period. *Idem*, 579

5. The act, Code, ch. 186, § 13, p. 710, directing that the time for which the right to sue out execution on a judgment is suspended by the terms thereof or by legal process, shall be omitted in computing the limitation, applies to judgments suspended by injunction at the time the act went into operation. *Idem*, 579

MANDAMUS.

1. In carrying out the provisions of the law in relation to sales of land for taxes, the County court acts ministerially; and if it refuses to act, the remedy is not by appeal but by *mandamus*. *Delaney v. Goddin*, 266

2. It seems *mandamus* is the proper remedy to be restored to an office in a bank. *Booker v. Young & als.* 303

3. The council of the city of Wheeling cannot be compelled by *mandamus* to grant a license to keep an ordinary. *Sights v. Yarnalls*, 292

4. Where a license is granted to commence at a future day, a *mandamus* will not lie against the proper officer to issue it before that day arrives. *Idem*, 292

5. In a case of this kind a *mandamus nisi* may be issued in the first instance, without a previous rule upon the party to appear and show cause against it. *Idem*, 292

MORTGAGES.

See *Equitable Mortgages*.

MURDER.

On a trial for murder, the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct. *Vaiden's Case*, 717

NONRESIDENT.

Who is a nonresident of the state, in the sense of the attachment law. See *Attachments*, No. 1, and

Clark v. Ward & als., 440

NOTICE.

What is a sufficient notice to take a deposition. See *Depositions*, No. 4, and

McGinnis v. Washington Hall Asso-
sociation, 602

ORDINARIES.

1. A statute requiring a license to keep a cook-shop, and laying a tax upon it, is not in conflict with and does not avoid, an ordinance of the city of Richmond passed in pursuance of its charter, prohibiting or restricting the keeping of cook-shops by free negroes within the city.

Mayo, mayor, v. James, 17

2. By an ordinance of the city of Wheeling, a license to keep an ordinary is to expire and be of no further effect on the 1st of May next succeeding the date thereof. The council having in April granted such a license for the ensuing year, such grant did not vest in the party to whom it was granted, any absolute or vested right to such license; but the right did not become perfect until the actual emanation of the license, or until the 1st of May following.

Sights v. Yarnalls, 292

3. By the same ordinance the council has authority to annul a license actually issued under its order. *A fortiori*, it may rescind an order granting a license before the 1st of May, which has not issued.

Idem, 292

4. A party to whom such license granted in April, cannot properly apply for a *mandamus* to compel the proper officer to issue it before the 1st of May; and therefore the pendency

of such *mandamus* cannot affect the right of the council to rescind the order granting the license before that time. *Idem*, 292

5. The council being authorized by the charter of the city to assess a tax on licenses to keep ordinaries, in addition to the state tax, it was competent for the council to make the payment of the tax a condition precedent to the emanation of the license. *Idem*, 292

6. The council having by an ordinance assessed a tax on a license to keep an ordinary, and having granted the license "under existing rates of taxation," such grant must be taken to refer not only to the state tax, but to the tax imposed by the council: and to require the payment of the latter as the condition of the right to call for the license. *Idem*, 292

7. In such case, though the tax was unequal, oppressive and illegal, yet as its payment was a condition precedent to the emanation of the license, without the performance of the condition nothing passed under the grant: And the condition cannot be separated from the grant and disregarded, so as to render the grant absolute and unconditional. The whole must be taken together and accepted or refused. *Idem*, 292

8. By the charter the city council has power to refuse a license to keep an ordinary; and if the tax laid is unjust, excessive and illegal, it is in effect the exercise of this power, and for all legal purposes should be so regarded. And the exercise of this power cannot be controlled by the Circuit court by *mandamus* or otherwise. But the charter authorizing a party to whom license is refused to apply to the County court of Ohio county for it, his only remedy is to apply to that court. *Idem*, 292

9. The order granting the license having been made in April, if the tax then imposed was illegal, or if no tax had been assessed upon it at the time, it was competent for the council, at any time before the 1st of May, to modify its grant by requiring the payment of a legal tax, in lieu of that which was illegal, or to supply the omission to lay a tax on ordinaries. And without the payment of this tax at least the party to whom the license

had been granted had no right to demand it. *Idem*, 292

10. Upon a *mandamus nisi* sued out by the party to whom the license had been granted by the council, against the officer whose duty it is to issue the license, he may in his return set up the ordinance imposing a tax upon licenses, passed since the order granting the license. *Idem*, 292

11. In a case of this kind a *mandamus nisi* may be issued in the first instance, without a previous rule upon the party to show cause against it. *Idem*, 292

PARTIES.

1. All persons having an interest or color of interest in the residuum of an estate, must be parties to a suit in which the court is to decide upon the construction of the will affecting that residuum.

Osborne & als. v. Taylor's adm'r & als. 117

2. When slaves may be parties to a suit. See *Slaves*, No. 4, and

Idem, 117

3. In a bill by a residuary legatee against the administrator with the will annexed, who is insolvent, and his sureties T and H, C the son of T has received assignments of a number of the legacies, claiming them as his own; but H insists they belong to T, and were purchased at a large discount, the benefit of which he claims. H insists further that C shall not be paid these legacies until T or T and C shall file a cross-bill against him, and thus give an opportunity to contest C's right. If C is not entitled to the legacies, he is entitled to compensation for purchasing them up. C is a proper party defendant to the original bill, to have his right to the legacies settled. And T and C having filed a cross-bill against H, setting up C's right to the legacies, H cannot object to it at the hearing, after having insisted on it. And if C is held not entitled to the legacies, he should be allowed compensation for purchasing them.

W. & C. Tarr v. Ravenescroft & als. 642

Same v. Hendricks' adm'r & als. 642

4. A *caveat* is revived in the name of the executor of the cavarator, who

is directed to sell the land, and of the legatees of the proceeds of sale; and no objection is taken thereto until after the verdict: The executor being the proper party, the irregularity of joining the others with him will then be disregarded.

Caruthers & al. v. Eldridge's ex'or & als. 670

PARTITION.

1. Upon a bill for partition of land, as a general rule, the share of each parceller should be assigned to him in severalty. And if from the condition of the subject or the parties, it is proper to pursue a different course, the facts justifying a departure from the rule should, at least where infants are concerned, be disclosed by the report, or otherwise appear, to enable the court to judge whether or not their interests will be injuriously affected. *Curtis v. Snead & als.* 260

2. Where the same parties are entitled to lands derived from their father, and also to lands derived from their mother, and some or all of them are infants, if these lands are blended in the division, it must appear to the court that the interest of the parties in general will be promoted by this mode of partition, to enable the court to protect the rights of the infants.

Idem, 260

3. Where the widow of the person who died seized of the lands of which partition is sought, is alive and entitled to dower, she should be a party to the suit: and her dower should be assigned to her, and partition made of the residue. And it is error to proceed in her absence, and make partition of the land subject to her right of dower. *Idem,* 260

PARTNERS.

1. See *Husband and Wife*, No. 4, and *Penn v. Whiteheads*, 74

2. The creditor of a partnership may lose his remedy against the estate of the deceased partner by his laches in prosecuting his claim against the surviving partner. *Jackson's adm'r v. King's adm'r & als.* 499

3. In such case there is no definite and fixed rule by which to measure the delay and neglect which will de-

prive the creditor of his remedy against the estate of the deceased partner. Each case must stand on its own circumstances and be judged by them. *Idem,* 499

4. In such case, whilst the creditor may not be held to adopt a very rigorous course, nor to exercise the utmost possible diligence, at least he may be required within a reasonable time to place the debt in the ordinary channels of collection, and to give it that attention during its progress which may render it probable that in the natural course the money may be made, and the estate of the deceased partner thus saved harmless.

Idem, 499

5. Where the creditor fails *bona fide* to use ordinary or reasonable diligence to collect his debt, or where measures have been taken to compel payment from the surviving partner, and there has been gross and unaccountable delay in the proceedings adopted, and it is palpable that the consequences of such delay have been to cast upon the estate of the deceased partner a debt which might certainly have been obtained from the surviving partner, and which it was his duty to pay, this is such *laches* as will forbid a court of equity to lend its aid to subject the estate of a deceased partner. *Idem,* 499

PAYMENTS.

1. See *Executors and Administrators*, No. 2, and *Corbell's ex'or v. Zeluff & als.* 226

2. See *Vendors and Purchasers*, No. 6, and *Peers v. Barnett & als.* 410

PERPETUITIES.

The doctrine of perpetuities applicable to bequests of personal chattels, does not apply to the bequest of freedom to a slave.

Wood v. Humphreys, 333

PLEADING.

1. A plea that the plaintiffs are an unchartered banking company, and as such discounted the note declared on, or a plea that the consideration of the note was the bank paper of such unchartered banking company,

is a good defense, and the plea need not conclude as against the form of the statute. *Hamtramck v. Selden, Withers & Co.* 28

2. A bond is for the payment of money, "which sum may be discharged in bonds due on good solvent men living in the county of R." In debt on this bond, it is not necessary to notice the provision as to the payment of the money in the declaration. *Butcher v. Carlile,* 520

PRACTICE AT COMMON LAW.

1. When the appellate court will send the cause back with leave to amend the pleadings. See *Appellate Court, No. 1, and Hamtramck v. Selden, Withers & Co.* 28

2. An entry that the defendant relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of, &c. and judgment accordingly, is a judgment by confession, and releases all previous errors in the proceedings in the cause.

Richardson's ex'r & al. v. Jones, 53

3. In an action of debt against two, one dies, and the suit is revived against his executrix; and then she and the other defendant give separate confessions of judgments, and a separate judgment is entered against each. This is not error. *Idem,* 53

4. See *Instructions,* No. 1, 3, 4, and *Harvey & al. v. Epes.* 153

Green & als. v. Crain & als. 252

*Hutsonpiller's adm'r v. Stover's
adm'r,* 579

5. In an action of debt the common order is confirmed at rules irregularly, the defendant having pleaded as to a part of the plaintiff's demand. This irregularity cannot be corrected at rules. *Southall's adm'r v. Exchange Bank of Va.* 312

6. An irregularity committed at rules may be corrected at the next term of the court; and the plaintiff may be allowed to withdraw a defective replication and reply; and if the plea filed at rules does not go to the whole demand, he may sign judgment for so much as is not covered by the plea. *Idem,* 312

7. In such case the defendant is entitled to a continuance of the cause as of right, if he demands it. But if instead of asking for a continuance,

he asks that the cause may be sent to rules, and excepts because his motion is overruled, the appellate court cannot reverse the judgment, because the court required him to proceed to trial. *Idem,* 312

8. Where suit for freedom brought in wrong county, when and how court will correct it. See *Slaver,* No. 11, 12, and *Ratcliff v. Polly & als.* 528

9. Under what circumstances it is error to refuse to continue a cause. *Fiotl & als. v. The Commonwealth,* 564

10. In a common law attachment, the garnishee is only bound to pay the debt he owes upon getting a release under seal from all claims arising under the contract. The common law court has no authority to make its judgment against the garnishee operate as a release under seal. *Balt. & Ohio R. R. Co. v. McCullough & Co.* 595

11. Where a jury is dispensed with, and the court tries the cause, an exception to the judgment of the court as being contrary to the evidence, must be framed as is an exception for the refusal of the court to grant a new trial on the same ground.

Pryor v. Kuhn, 615

12. When deposition may be objected to. See *Depositions,* No. 2, and *Unis & als. v. Charlton's adm'r & als.* 484

13. See *Evidence,* No. 11, 12, and *Idem,* 484

PRACTICE IN CHANCERY.

1. A ground which existed and was known to a party before a decree, is not ground for a bill of review. *Suckley's adm'r v. Rotchford & als.* 60

2. See *Creditor and Debtor,* No. 2, 3, and *Idem,* 60

3. A rule of practice prescribed by the Supreme court of the U. S. which is in conflict with an act of congress, is void. *Idem,* 60

4. Upon motion to dissolve an injunction in vacation, it is overruled. The court may proceed to appoint a receiver to sell and collect the property and debts. *Penn v. Whiteheads,* 74

5. But court may not direct the receiver to pay debts for which the property is primarily bound; but they should be reported on by a commissioner. *Idem,* 74

6. How partition should be made. See *Partition*, and *Curtis v. Snead & als.* 260

7. It is not the duty of the court to advise a party as to the sufficiency of his proof. As to that he must judge for himself before going to a hearing of his cause.

Winston v. Starke & als. 317

8. If a party has doubt about the admissibility of his proof when objected to, he may bring the question before the court, and have it decided before going to a hearing. *Idem*, 317

9. A court of equity will not decree a sale of land for payment of purchase money, whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale. *Peers v. Barnett & als.* 410

10. Although at the time of filing such bill the defects in the title would forbid the sale of the land, yet the lapse of time and uninterrupted possession by the vendee under the deed, the absence of any suggestion of disturbance or of the assertion of any adverse claim during the long pendency of the suit, may quiet the vendee's title, and cure the defects thereof: And a decree for the sale may be proper. *Idem*, 410

11. In such case, as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs. *Idem*, 410

12. The vendee claims a credit for payments and offsets against the purchase money, and a commissioner is directed to state an account of them; but he contumaciously refuses to present his vouchers and evidence before the commissioner, but when the report is returned files exceptions to it. Though it is probable he may be entitled to some credits not allowed him, yet having refused to submit them to the commissioner where they might have been properly investigated, they will not be allowed. *Idem*, 410

13. As to the proceedings in suits for sale of infants' lands, see *Infants*, No. 1, and

Hughes & wife v. Johnston, 479

PRINCIPAL AND AGENT.

1. To prove the authority of an agent, the parol directions of the prin-

cipal to him may be given in evidence. *Lunsford v. Smith*, 554

2. The statements of a division engineer of a railroad company as to the indebtedness of the company to a defendant in an attachment, where the railroad company was summoned as a garnishee, are not evidence against the company, it not appearing that he was the agent of the company having authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to, so as to make his statements a part of the transaction, and explaining the nature thereof.

Balt. & Ohio R. R. Co. v. Gallahue's adm'r's, 655

PRINCIPAL AND SURETY.

1. See *Contracts*, No. 1, and *Young v. Threatt & als.* 1

2. See *Executors and Administrators*, No. 2, and

Corbell's ex'r or v. Zeluff & als. 226

3. There is principal and surety in a bond, and the principal conveys land to the surety in consideration that the surety will pay the debt. This does not convert the surety into the principal and the principal into the surety in respect to the creditor, so that the original principal may be released by the dealing of the creditor with the original surety.

William & Mary College v. Powell & als., 372

4. One of two sureties of an insolvent administrator purchases up legacies for which the sureties are bound, at a discount. He shall only charge his cosurety for his proportion of what he paid for the legacies, and of the expenses of purchasing them.

W. & C. Tarr v. Ravencroft & als. 642
Same v. Hendricks' adm'r & als. 642

PROBAT.

See *Administration*.

PROCEEDINGS IN REM.

See *Frauds*, No. 2, and

Winston v. Starke & als. 317

PROHIBITION.

1. The mayor of the city of Richmond has authority to try cases in which a party is prosecuted for the violation of a city ordinance. *Quere:* Whether in such a case a prohibition will lie to his proceeding to try the case, on the ground that the ordinance is in conflict with an act of the general assembly: And it seems it will not. *Mayo, mayor, v. James,* 17

2. For the mode of proceeding in the case of prohibition, see the opinion of MONCURE, J. *Idem,* 17

3. There must be a rule to show cause why the prohibition should not issue, before the writ is issued. *Idem,* 17

4. This rule to show cause operates as a prohibition until the further action of the court. *Idem,* 17

PURCHASER FOR VALUE.

Widow as to her portion of her husband's personal estate, is not a purchaser for value.

Snoddy v. Haskins & als. 363

RECEIVER.

A judge having authority to hear motions to dissolve injunctions in vacation, that carries with it the power in vacation to appoint a receiver, where one is necessary.

Penn v. Whiteheads, 74

RELEASE.

See *Evidence*, No. 6, and

Unis & als. v. Charlton's adm'r & als. 484

SALE OF INFANTS' LAND.

See *Infants*, No. 1, and

Hughes & wife v. Johnston, 479

SECURITIES.

When an assignment of a legacy will be held only as a security. See *Legacies and Legatees*, No. 1, 2, and *Gav v. Huffman,* 628

SETTLEMENTS.

1. As to proof of the consideration

of a post nuptial settlement, see *Husband and Wife*, No. 13, and

William and Mary College v. Powell & als. 372

2. See *Trusts and Trustees*, No. 4, and *Nixon v. Rose, trustee,* 425

SHERIFF.

See *Administration*.

SLAVES.

1. Administrator with the will annexed having in his possession slaves of his testator, and being in doubt whether they are emancipated by the will, may come into equity making the legatees and next of kin of the testator parties, and ask the court to construe the will. And in this suit, the court being of opinion that the slaves are emancipated by the will, may decree in their favor and direct that they be freed.

Osborne & als. v. Taylor's adm'r & als. 117

2. Testator bequeaths the whole of his slaves not before disposed of, to trustees for the use of J for her life, and directs that at her death, the slaves embraced in this clause of the will be emancipated. But should they or any of them prefer remaining in this state, they can do so by choosing masters to serve during life of the person chosen; and then they are to have the option of freedom or slavery by making a second choice. *Held:*

1st. The slaves are emancipated, and the condition is repugnant and void. *Idem,* 117

2d. The slaves born during the life of J are emancipated. *Idem,* 117

3. The administrator having filed his bill after the death of J, when there were no debts of testator, and having submitted the slaves to the control of the court; and they having been hired out by him under the direction of the court, during the pendency of the suit; they are entitled to have their hires: And this especially as though the bill was filed before the act of 1850, ch. 106, § 8, p. 465, it was not decided until after that act went into operation. *Idem,* 117

4. In such suit it is no objection that the slaves are parties. *Idem,* 117

5. The doctrine of perpetuities

applicable to bequests of personal chattels, does not apply to a bequest of freedom to a slave.

Wood v. Humphreys, 333

6. Testator by his will directs that a female slave Nancy shall be freed at the end of twenty years from his death. And he then directs that if she shall have children whilst she continues in servitude, "the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall become free." Within the twenty years Nancy has a child J; and before J is thirty-one she has a child M. At the age of thirty-one M is entitled to her freedom. *Idem*, 333

7. The principle of the case of *Maria v. Surbaugh*, 2 Rand. 228, recognized and affirmed.

Taylor v. Cullins, 394

8. Testator gives all his estate to his two daughters for life, or until they marry; and directs that his slaves whom he names, shall be free on the happening of either event. And he gives them all the property which should then remain. One of the slaves has a child and dies during the lifetime of the daughters. The child is not freed by the will, but is embraced in the bequest to the slaves: And by the act of March 15th, 1832, Sup. Rev. Code, p. 246, the bequest of the child to the emancipated slaves is void. *Idem*, 394

9. Suits for freedom must be brought in one of the courts of the county or corporation in which the party suing is detained in custody by the person having him in custody.

Ratcliff v. Polly & als. 528

10. Where a person having persons of color in custody claiming them as slaves, resides in one county; and brings them into another county in obedience to a writ of *habeas corpus* sued out for them, this is not such a detention of them in this last county as will give the courts thereof jurisdiction of a suit instituted by them there for their freedom: And this especially if the resort to the writ of *habeas corpus* was a contrivance to give jurisdiction of the case to the courts of the county to which they are so brought. *Idem*, 528

11. In such a case the court should dismiss the suit upon the motion of

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the defendant. And a rule upon the plaintiffs to show cause why the suit should not be dismissed, is a proper mode by which to raise the question of jurisdiction. *Idem*, 528

12. Though the petition of the paupers and the warrant of the justice are returned into court at one term, when one of the claimants enters himself a party, and the cause is then continued; and though depositions are taken by consent to be read on the trial, before the next term, yet no summons having been served on the person in whose custody the paupers were, he having entered himself a party at the next term, may then have the suit dismissed for want of jurisdiction: And it will be dismissed as to both defendants. *Idem*, 528

13. A master may give a general written consent to the purchase by his slaves of ardent spirits of a particular person; which will be valid to protect the seller from incurring the penalties prescribed by the act, Code, ch. 104, § 1, p. 459.

Johnson's Case, 714

Gary's Case, 714

Pankey's Case, 714

14. As to the responsibility of the hirer of slaves for their loss, whilst employed in violation of the contract of hiring, see *Bulment*, and

Harrey & als. v. Epes, 153

SPECIFIC PERFORMANCE.

1. A court of equity will not decree the specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee; the wife refusing to execute the contract. *Clarke & als. v. Reins*, 98

2. Nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land. *Idem*, 98

3. The wife being one of three equal joint owners of the land, and they and the husband having united in the sale; though the husband and wife will not be compelled to execute the contract on their part, the other joint owners will be compelled to convey their undivided interests upon the payment by the vendee of their shares of the purchase money. *Idem*, 98

4. The case distinguished from *Baily v. James*, 11 Gratt. 468. *Idem*, 98

STATUTES.

1. The act, Code, ch. 181, § 1, 5, p. 681, in relation to amendments, construed in

Richardson's ex'r & al. v. Jones, 53

2. The act, Code, ch. 130, § 10, p. 542, in relation to committing estates to sheriffs, construed in

Hutcheson, sheriff, adm'r &c. v. Priddy, 85

3. The act, Code, ch. 37, § 15, in relation to proceedings on sales of land for taxes, construed in

Delaney v. Goddin, 266

4. The act of 1840, Sess. Acts, ch. 55, p. 47, in relation to recording papers burned in the clerk's office, construed in

Taliaferro & als. v. Pryor, 277

5. The act, Code, ch. 16, § 17, in relation to the election of public officers, construed in

Booker v. Young & als. 303

6. The act, Code, ch. 171, § 51, p. 653, in relation to the control of the court over proceedings at rules, construed in

Southall's adm'r v. Exchange Bank of Va. . 312

7. The act, Code, ch. 149, § 13, p. 593, in relation to limitation of suits to set aside conveyances on considerations not deemed valuable in law, construed in

Snoddy v. Haskins & als. 363

8. The act, Code, ch. 188, § 3, 4, p. 717, in relation to the lien of a *fi. fa.* construed in *Puryear v. Taylor*, 401

9. The act, Code, ch. 186, § 13, p. 710, in relation to the time of suing out execution on judgments suspended, &c. construed in

Hutsonpiller's adm'r v. Storer's adm'r, 579

10. The act, Code, ch. 163, § 9, p. 629, in relation to dispensing with a jury trial, construed in

Pryor v. Kuhn, 615

11. The act, Code, ch. 151, § 2, p. 601, in relation to attachments, construed in

Balt. & Ohio R. R. Co. v. Gallahue's adm'rs, 655

12. The act, Code, ch. 162, § 4, p. 628, in relation to exceptions to jurors, construed in *Dilworth's Case*, 689

13. The act, Code, ch. 104, § 1, p. 459, in relation to selling to slaves, construed in *Johnson's Case*, 714

SUBSTITUTION.

See *Executors & Administrators*, No. 3, 4, 5, 6, 7, 8, 9, and *Gaw v. Huffman*, 628

SUITS FOR FREEDOM.

See *Slaves*, No. 9, 10, 11, 12, and *Ratcliff v. Polly & als.* 528

SURETIES.

See *Principal and Surety*.

TAX SALES.

1. The County court, in passing upon any question under the act, Code, ch. 37, § 15, is invested with no judicial power, but acts in a capacity purely ministerial: And in determining whether or not it will order a report of a surveyor therein required, to be recorded, is restricted to the consideration of objections to the report, and has no right to look beyond the return of the list of sales by the sheriff required by § 11 of said chapter. *Delaney v. Goddin*, 266

2. In such a case, it is the duty of the court to see whether the said report is in conformity with the provisions of said section 15, requiring it to specify the metes and bounds of the land sold, and the names of the owners of the adjoining tracts, and to give such other description of the land sold as will identify the same. And in order to the discharge of that duty, no enquiry into the regularity or validity of the previous proceedings is necessary or proper. *Idem*, 266

3. In such a case, upon a motion by the purchaser to order the report of the surveyor to be recorded, the County court not acting judicially, has no authority to render a judgment overruling the motion with costs. *Idem*, 266

4. If a County court renders such a judgment, upon appeal to the Circuit court, that court should simply reverse the judgment with costs; but should not proceed to order that the

report of the surveyor should be recorded : The error of the County court in refusing to order the report to be recorded, can only be corrected by *mandamus*, and not by writ of error or *supersedeas*. *Idem*, 266

TROVER.

See *Bailment*.

TRUSTS AND TRUSTEES.

1. Though a conveyance by a husband in trust for his wife is declared fraudulent and void as to creditors at the suit of one creditor, this cannot be relied on by another creditor in another suit, but he must charge the fraud; and if it is put in issue by the answer, he must prove it.

Winston v Starke & als. 317

2. In such case the plaintiff not having been a party to the first suit, the record thereof is not competent evidence to establish the fraud.

Idem, 317

3. See *Frauds*, No. 1, 2, and

Idem, 317

4. Testatrix bequeaths slaves to A, B and C jointly, upon the following trust: To be held by them in trust for the benefit of her daughter E, (a married woman,) or her heirs. And as it is my wish to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property, during the natural life of E, it is hereby wholly and solely confided to the discretion of the aforesaid trustees A, B and C, in what manner the said E shall receive and enjoy the profits arising from the hires or other disposition of the slaves aforesaid. And in the event of the death of E without heirs of her body, then all the slaves and their increase to B. HELD:

1st. E took an absolute interest in the slaves; and the bequest over is void. *Nixon v. Rose, trustee*, 425

2d. That it is a bequest to the separate use of E. *Idem*, 425

3d. That E separately or jointly with her husband, had no power to alienate the slaves during her coverture. *Idem*, 425

4th. That the trustees may permit E and her husband to take posses-

sion of the slaves, and thus enjoy the profits of them. *Idem*, 425

5th. Two of the trustees having died since the death of the testatrix, the legal title survived to the third; and he may maintain an action to recover one of the slaves which had been sold by the son in law of E, with her consent. *Idem*, 425

5. When deed of trust fraudulent per se. See *Conveyances—Fraudulent*, No. 2, and

Addington v. Etheridge, coroner, 436

6. A trustee sells land and bids it in for the creditor, but no conveyance or memorandum in writing of the purchase is made, nor is possession taken; but the possession remains in the former owner under an agreement, as it is said, with the trustee, who is also the agent of the creditor, that the said owner shall take it at the bid. The purchase is not valid, and the creditor will not be charged with the land at the price at which it was bid in. *William & Mary College v. Powell & als.* 372

7. A deed is made conveying personal property to trustees for the purpose of paying debts specified therein; and the trustees take possession of the property and proceed to sell it for the purpose of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, this was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.

Clark v. Ward & als. 440

8. A creditor secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed to the payment of his debt, in preference to the other creditors; but he fails. This does not preclude him from his right to claim under the deed, his ratable proportion of the trust fund. *Idem*, 440

9. See *Equitable Jurisdiction and Relief*, No. 6, and *Idem*, 440

UNCHARTERED BANKS.

1. To an action of debt on a note alleged to have been made, and to have been discounted by the plaintiffs in Virginia, but made payable at

a bank out of the state, a plea that the plaintiffs are an unchartered banking company issuing and circulating their own paper, notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action. *Hamtramck v. Selden, Withers & Co.* 28

2. So in such a case, a plea that the consideration of the note declared on, was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action. *Idem,* 28

VENDOR AND PURCHASER.

1. A widow having her distributable share of her husband's personal estate, is not a purchaser for value, so as to set up the defense of purchaser for value without notice.

Snoddy v. Haskins & als. 363

2. Land is purchased by the acre; but after the survey is commenced the vendee agrees to take it at the quantity for which the vendors held it; and the survey is stopped. He is concluded by his agreement, and is not entitled to an abatement from the purchase money on account of a deficiency in the quantity.

Peers v. Burnett & others. 410

3. A court of equity will not decree a sale of land for payment of the purchase money whilst there is a cloud upon the title. But if the cloud is removed before the hearing, the vendor is entitled to a decree for the sale. *Idem,* 410

4. Although at the time of filing such bill the defects in the title would forbid a sale of the land, yet the lapse of time, and uninterrupted possession of the vendee under the deed, the absence of any suggestion of disturbance, or of the assertion of any adverse claim during the long pendency of the suit, may quiet the vendee's title, and cure the defects thereof: And a decree for the sale may thus be proper. *Idem,* 410

5. In such case as the vendee was not in default when the suit was commenced, he is entitled to a decree for his costs. *Idem,* 410

6. The vendee claims a credit for payments upon and offsets against the purchase money, and a commissioner is directed to state an account of them. He however contumaciously refuses to present his vouchers and evidence before the commissioner; but when the report is returned, files exceptions to it. Though it is probable he may be entitled to some credits not allowed him, yet having refused to submit them to the commissioner where they might have been properly investigated, they will not be allowed. *Idem,* 410

VERDICT.

How the verdict must respond to the issue. See *Attachments, No. 9, and Balt. & Ohio R. R. Co. v. Gallahue's adm'r's,* 655

WATER COURSES.

H owning lands on both sides of a creek which frequently overflows its banks, built a dike along the south side of it to protect his low grounds on the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W, the land on the north side; and in their report they make no allusion to the dike. The son who received the land on the south side of the creek, afterwards sold it to B; and then W owning the land on the north side, commenced to build a dike on that side to protect his lands, which would have the effect to destroy the dike built by H, and flood the low grounds on the south side. B then filed a bill to enjoin the building of the dike on the north side. HELD:

1st. B is entitled to have his dike as it was when H died, and to have his lands protected thereby; and W has no right to build a dike on his side of the creek, which would destroy the dike of B, or overflow his low grounds. *Burwell v. Hobson,* 322

2d. Equity will interfere to prevent the building of the dike, and will compel W to abate so much of his

dike already built as would injure the
dike and low grounds of B.

Idem, 322

WHEELING.

See *Ordinaries*.

WILLS.

1. In expounding a will, the court will make the ampiest allowance for the unskillfulness and negligence of the testator; technical informalities will be disregarded; the most perplexing complication of words and sentences will be carefully unfolded; and the traces of the testator's intention will be diligently sought out in every part of the instrument; and the whole carefully weighed together.

Wootton v. Redd's ex'r & al., 196

2. To aid in the true construction of the will, evidence may be received of any facts known to the testator, which may reasonably be supposed to have influenced him in the disposition of his property; and as to all the surrounding circumstances at the time of making the will. *Idem*, 196

3. But declarations of the testator as to his intention to make a particular bequest, or that he has made such a bequest, is not competent evidence, except where the terms used in the will apply indifferently, and without ambiguity, to each of several subjects or persons; when evidence may be received as to which of the subjects or persons so described was intended by the testator. *Idem*, 196

4. In construing a will, effect must be given to every word, if any sensible meaning can be given to it not inconsistent with the general intention apparent on the whole will taken together. Words are not to be rejected or altered unless they manifestly conflict with the intention of the testator, or unless they are absurd, unintelligible or unmeaning for want of any subject to which they can be applied. *Idem*, 196

5. Though it may be possible that the testator intended to give more, yet if there be a subject found to satisfy the description in the will, the court can neither enlarge or extend it. *Idem*, 196

6. But where the subject is suffi-

ciently and clearly ascertained, though there be added particulars of description which are false or mistaken, effect will be given to the devise notwithstanding; and the false or mistaken description will be rejected.

Idem, 196

7. But if such particulars of description are restrictive in their character; if they serve to narrow and limit the extent of the subject pointed out by the previous words, they never can be rejected. And if there be a subject which satisfies the whole description taken together, evidence is inadmissible to show that the testator intended a greater or different subject.

Idem, 196

8. If the words in a will describe nothing, or if with the aid of surrounding circumstances they are insufficient to determine the testator's meaning, so that it may be ascertained with legal certainty what is the exact subject devised, the devise is void for uncertainty.

Idem, 196

9. A case in which the first part of the devise is sufficient to pass a large tract of land, but the language is capable of being restricted by the addition of boundaries, and it is followed by calls for certain lines which are nearly a straight line, and which describe nothing and include no space: And the surrounding circumstances do not show with legal certainty whether the whole or what part of the land was intended to be passed by the devise: It is void for uncertainty.

Idem, 196

10. C subscribes his name to his will in the presence of R who wrote it, and requests R to witness it, who does so. H is then called into the room, and requested by C to witness the instrument, and C acknowledges his signature to him in the presence and hearing of R, and H subscribes his name as a witness in the presence of the testator and R. HELD:

1st. Though the testator spoke of the paper as an instrument, and did not speak of it as his will to H, yet knowing that it was his will, and knowing its contents, it was a sufficient publication of it as his will.

Beane & wife v. Verby, 239

2d. The acknowledgment of his signature by C was a sufficient acknowledgment of the will. *Idem*, 239

3d. The will was duly executed. *Idem*, 239

11. The act, Code, ch. 122, § 4, p. 516, does not change the former law either as to what shall constitute an acknowledgment or a publication of a will. *Idem*, 239

12. A paper prepared as the will of C is read to him by the scrivener and approved; and then the scrivener, at the request of C, subscribes C's name to the paper, and by like request he attests it; and no other witness attests it in the presence of this one. About three days after C acknowledges the paper as his will in the presence of H, who at his request attests it in his presence. No other witnesses attest the paper on that day; but about four days after H is again at the house of C, when C requests W to attest the paper, which W does in the presence of C and H, and C then acknowledges the paper as his will in the presence of H and W. The will is duly executed. *Green & als. v. Crain & als.* 252

13. In this case a motion to instruct the jury assumes all the facts stated by the subscribing witnesses as true, and asks the court to instruct the

jury, that the paper is not proved to be the will of C according to the statute. The instruction does not ask the court to pass upon the truth of the facts, but upon the law as applicable to them; and therefore is not objectionable. *Idem*, 252

WITNESS.

1. The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility by the proof of statements made by him at another time inconsistent with and contradictory of the statements in his deposition, before the foundation is laid by an examination of the witness touching the fact of his having made such statements. *Unis & als. v. Charlton's adm'r & als.* 484

2. What release will render a witness competent. See *Evidence*, No. 11, and *Idem*, 484

3. A husband is not a competent witness, after the death of the wife, to prove the consideration on which he made a post nuptial settlement upon her. *William & Mary College v. Powell & als.* 372

